

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH, PETITIONER,

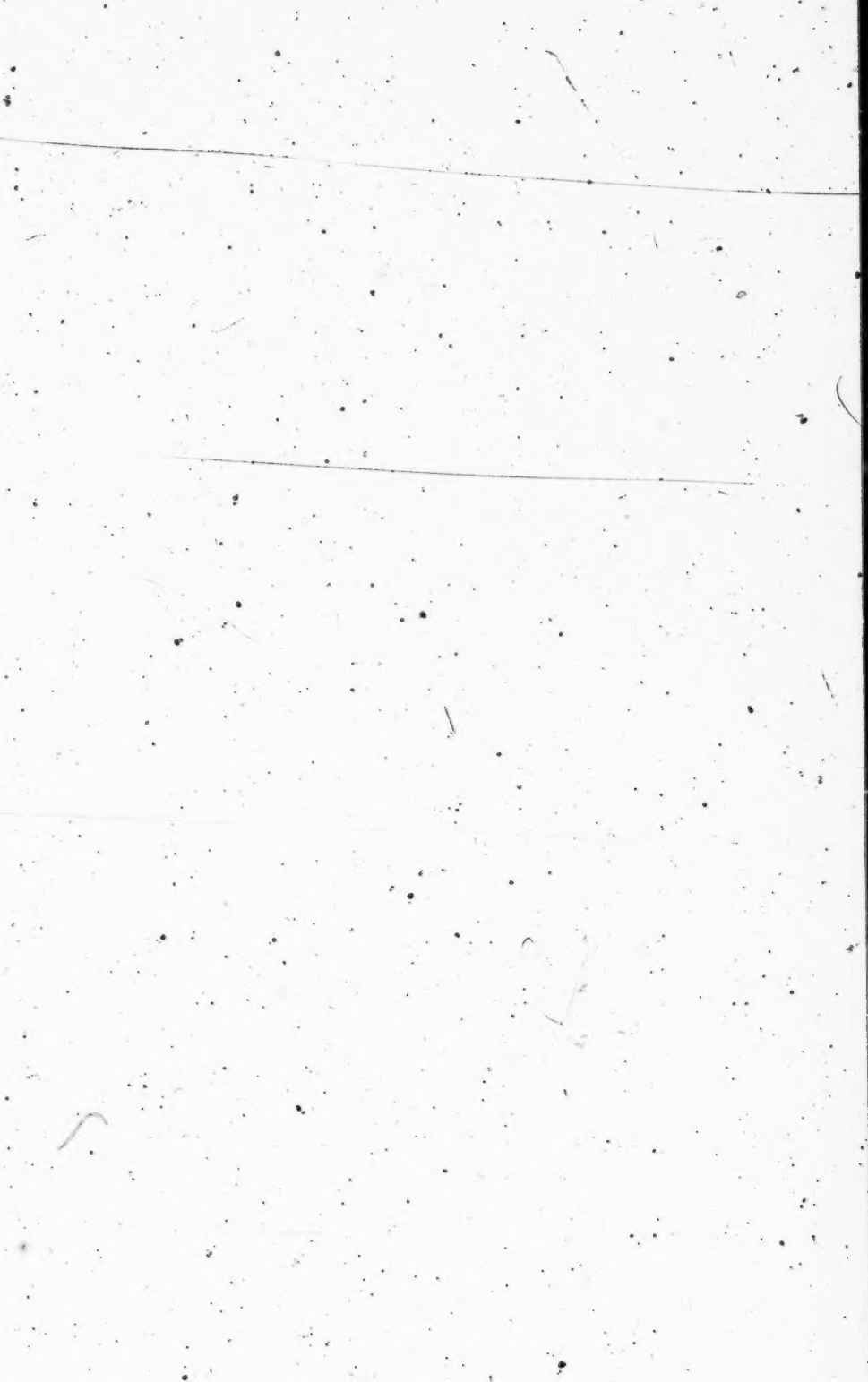
vs.

S. E. ALLWRIGHT, ELECTION JUDGE, AND JAMES
E. LIUZZA, ASSOCIATE ELECTION JUDGE, 49TH
PRECINCT OF HARRIS COUNTY, TEXAS

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR HABEAS CORPUS FILED APRIL 11, 1943.

HABEAS CORPUS GRANTED JUNE 2, 1943.



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**DESIGNATION OF CONTENTS OF RECORD ON
APPEAL.**

Filed June 6, 1942.

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION.**

Civil Docket No. 645.

LONNIE E. SMITH,

Plaintiff,

versus

**S. E. ALLWRIGHT and JAMES J. LIUZZA, Election
Judge and Associate Election Judge, 48th Precinct of
Harris County, Texas,**

Defendants.

Plaintiff, Lonnie E. Smith, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on his appeal taken in this cause to the Circuit Court of Appeals for the Fifth Circuit:

1. Plaintiff's Amended Complaint, filed April 25, 1942.
2. Appendixes A, B, C and D of Original Complaint, filed November 15, 1941.
3. Defendants' Amended Answer, filed April 25, 1942.
4. Depositions of E. B. Germany and C. A. Butcher, filed April 25, 1942.

5. Testimony of Charles E. Kamp, filed April 25, 1942.
6. Stipulations of Facts, for both plaintiff and defendant, filed April 25, 1942.
7. Complete Question and Answer Transcript of the evidence as prepared and filed by J. E. McGinness, Official Court Reporter.
8. Plaintiff's Exhibit Number One, filed April 25, 1942.
9. Findings of Facts and Conclusions of Law, filed May 11, 1942.
10. Judgment entered May 30, 1942.
11. Notice of Appeal filed June 5, 1942.
12. Appeal Bond.
13. This designation of Contents of Record and agreement thereto.

Dated this 5th day of June, 1942.

THURGOOD MARSHALL,

(Thurgood Marshall)

W. J. DURHAM,

(W. J. Durham)

H. S. DAVIS, JR.,

(H. S. Davis, Jr.)

Attorneys for Plaintiff-
Appellant.

409 $\frac{1}{2}$ Milam Street,
Houston, Texas.

Service of a true copy of the foregoing designation of contents of record on appeal is hereby acknowledged, and

it is agreed that the foregoing portions of the record, proceedings and evidence in the case constitute all of the record, proceedings and evidence on the trial of the case, omitting only formal matters and repetitions, and the defendants, S. E. Allwright and James J. Liuzza, do not desire to designate any further material to be included in the record.

Signed this 5th day of June, 1942:

GLENN A. PERRY,

(Glenn A. Perry)

Attorney for Defendant.

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CAPTION.

In the District Court of the United States for the Southern District of Texas, Holding Sessions at Houston.

Lonnie E. Smith, Suing on Behalf of Himself and on Behalf of Other Qualified Negro Voters in the State of Texas,
Plaintiff,

vs. Civil Action No. 645.

W. D. Miller, County Clerk of Harris County, Texas, and S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris County, Texas, Defendants.

Be It Remembered, That in the above entitled and numbered cause, lately pending in said Court, in which Final Judgment was rendered at the Regular February, 1942, Term of said Court, to-wit: On May 30, 1942, the Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Southern District of Texas, presiding, the following proceedings were had; to-wit;

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FIRST AMENDED BILL OF COMPLAINT.

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Filed April 25, 1942.

(Title Omitted.)

To the Honorable Judge of said Court:

Now comes the plaintiff, Lannie E. Smith, suing on behalf of himself and all other qualified Negro voters similarly situated in the State of Texas who are believers in and adherents to the tenets and principles of the Democratic Party, and with leave of the Court first had and obtained, files this, Plaintiff's First Amended Bill of Complaint in lieu of and in substitution of the Original Bill of Complaint heretofore filed in this Cause on the 15th day of November, 1942, and for such Amended Complaint he complains of the defendants, S. E. Allwright, Election Judge, and James J. Liuzza, Association Election Judge, 48th Precinct of Harris County, Texas, acting as administrative officers of the State of Texas, and who unlawfully denied the plaintiff and other qualified Negro voters the right to vote in the statutory Democratic primary election in Texas on July 27, 1940, and August 24, 1940, solely because of race or color; and respectfully shows to this Honorable Court as follows:

1. The jurisdiction of this Court is invoked under subdivision 1 of Section 41 of Title 28 of the United States Code, this being an action at law which arises under the Constitution and laws of the United States, viz., Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen of said Constitution and Sections 31 and 43 of Title 8 of the United States Code, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00. The jurisdiction of this Court is also invoked under subdivision 11 of Section 41 of Title 28 of the United States Code, this being an action to enforce the

right of a citizen of the United States to vote in the State of Texas. The jurisdiction of this Court is further invoked under subdivision 14 of Section 41 of Title 28 of the United States Code, this being an action at law, authorized by law to be brought to redress the deprivation under color of law, statute, regulation, custom and usage of a State of rights, privileges and immunities secured by the Constitution of the United States, viz., Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen to said Constitution, and of rights secured by laws of the United States, viz., Sections 31 and 43 of Title 8 of the United States Code, all of which will appear more fully hereafter.

2. Plaintiff shows further that this is a proceedings for a declaratory judgment and in injunction under Section 400 of Title 28 of the United States Code (Section 274D of the Judicial Code) for the purpose of determining a question in actual controversy between the parties, to-wit, the question whether the practice of the defendants in enforcing and maintaining the policy, custom and usage by which plaintiff and other Negro citizens similarly situated who are qualified electors and denied the right to cast ballot at the Democratic primary elections in Texas, solely on account of their race or color, violates Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen to the Constitution of the United States.

3. That all parties to this action, both plaintiff and defendants are citizens of the United States and of the State of Texas, and are resident and domiciled in said State.

4. That the plaintiff, Lonnie E. Smith, is colored, person of African descent and of Negro blood. He is a native born citizen of the United States, is more than twenty-one (21) years of age, has resided in Precinct No. 48 in Harris County, Texas, continuously for a period of more than six

(6) years next preceding the filing of this complaint and has his poll tax receipt for the year of 1939, issued prior to January 31, 1940, as required by the laws of the State of Texas. Plaintiff at all times mentioned herein was and is a duly and legally qualified elector under the Constitution and laws of the United States and of the State of Texas, and is subject to none of the disqualifications provided for voting under the Constitution and laws of the State of Texas or of the United States. Plaintiff is a believer in the tenets of the Democratic Party; plaintiff has never voted for any other candidates than those of the Democratic Party. He was at all times complained of herein and is now ready and willing to take the pledge required by law in Texas of all persons voting in the Democratic Primary elections.

5. That this is a class action authorized by Rule 23-a of the Rules of Civil Procedure of the District Courts of the United States. The rights involved are of common and general interest to the members of the class represented by the plaintiff, namely, Negro citizens of the United States and residents of the State of Texas similarly situated who are duly qualified electors under the Constitution and laws of the United States and of the State of Texas. The members of the class are so numerous as to make it impracticable to bring them all before the Court and for this reason plaintiff prosecutes this action in his own behalf, and on behalf of the class, without specifically naming said members herein.

6. That on the 27th day of July, 1940, a Statutory Democratic primary election was held in the State of Texas, and in Harris County in said State, for nomination of candidates for United States Senator, Members of the United States of Representatives, Governor and other officers pursuant to the mandate of Article 3100, et seq., of the Revised Civil Statutes of Texas. That prior to the 1940 Statutory

Democratic Primary election, defendant S. E. Allwright was duly appointed and qualified as Judge of Elections for Precinct No. 48 in Harris County, Texas, and prior to said election defendant James J. Lianza was duly appointed and qualified as Associate Judge of Elections in Precinct No. 48; both of said defendants were appointed and acted solely under authority of Articles 3104 and 3105 of the Texas Revised Civil Statutes.

7. That the Constitution of the United States secures to qualified voters within the State of Texas the right to cast their ballots at congressional elections. Pursuant to the provisions of Sections 2 and 4 of Article I, and Amendment Seventeen to the Constitution of the United States, the State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article 2958 of the Revised Civil Statutes of Texas. (See Appendix B, attached hereto and prayed to be read as a part hereof.)

8. That in addition, the State of Texas exercising an essential governmental function has established, both by constitutional provisions and statutes, elaborate machinery for the exercise of the elective franchise. Included therein are three steps, namely, the listing of qualified voters, selection of candidates and the general elections. Complete and detailed requirements for the listing of qualified electors and the holding of elections are established by statutes which have been codified in the Revised Civil Statutes of Texas, (Articles 2923-3165). All elections to public office held in the State of Texas are held under the authority of these statutes.

9. Primary elections in Texas were created by statute and have been maintained solely by authority of the statutes of the State of Texas. The present election laws of Texas originated with the so-called "Terrell Law", being

"An Act to regulate elections and to prescribe penalties for its violation (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82 to 107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C, attached hereto and prayed to be read as a part hereof as though set out in full. Since 1905, this legislation has constituted the sole authority for the conduct of all elections, primary, special and general, in the State of Texas.

10. That candidates for the office of United States Senator from Texas can only be placed on the official ballot in the general election after nomination at the statutory primary election. Elections of Senators from Texas to the Congress of the United States are regulated by Articles 3086 to 3089 of the Revised Statutes of Texas, Articles 3089 and 3090, Article 3089 of which provides: "The name of no candidate for United States Senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless the said candidate has been duly nominated and selected as herein provided", and, "each party desiring to nominate a candidate for United States Senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidates at a general primary election to be held throughout the State on the fourth Saturday in July next preceding such election for United States Senator".

11. That Article 3101 of the Revised Civil Statutes of Texas requires that candidates for the United States Con-

gress, Governor, and State officers of political parties that cast one hundred thousand votes or more be nominated in statutory primary elections. The Democratic Party is the only organized political party in Texas that cast more than *one hundred votes* at the last general election prior to July 27, 1940.

12. That since 1859 nominees of the Democratic Party have been elected in all major elections with two exceptions. Tables showing the results of elections in Texas from 1859 to 1940, are filed herewith as Appendix D, and prayed to be read as a part hereof as though set out in full.

13. That pursuant to Chapter 12 and 13 of Title 50 of the Revised Civil Statutes of Texas it was required that the Democratic primary elections be held on the fourth Saturday in July, 1940, and on the fourth Saturday in August, 1940, being respective, July 27, 1940, and August 24, 1940. The holding of this Primary election was mandatory under the laws of Texas as an integral part of the election machinery of the State of Texas and as an essential governmental function of said State of Texas. Article 2956 of the Revised Civil Statutes of Texas authorized absentee voting as in general elections; Articles 2980-2981 specified the form of ballot and the manner of its marking as other articles do for the general elections; Article 2984 fixed the number of ballots to be provided; Articles 2986, 1987, and 2990 permitted the name of the voting booths, guard rails, and ballot boxes which by Articles 2986-2997 of the Revised Civil Statutes of Texas are provided for general elections; Article 2997a, as amended by Acts 1937, ch. 52, makes identical provisions for use of voting machines in both "primary" and "general" elections in Texas; Articles 3003-3-25 provided elaborately for the purity of the ballot box in primary elections; Article 3128 commanded that the sealed ballot boxes be delivered to the defendant as

county clerk after the Primary election as is provided in Article 3028 for general elections; and Articles 3146-3152 conferred jurisdiction of primary election contests upon State District Courts as is provided by Articles 3041-3075 in case of General elections.

14. That defendants S. E. Allwright as Election Judge and James J. Liuzza as Associate Election Judge on July 27, 1940, and August 24, 1940, were appointed, qualified, and acting as administrative officers of the State of Texas solely by virtue of Articles 3104 and 3105 of the Revised Civil Statutes of Texas. Both of said defendants herein, at all times mentioned herein, were State officers within the meaning of the Constitution of the United States. On the above dates the defendants, as Election Judge and Associate Election Judge, were under a positive statutory duty to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Defendants Allwright and Liuzza were also required to compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance to the polling place, and to arrest, or cause to be arrested anyone engaged in the work of conveying voters to the polls in carriage or other conveyances, except as permitted by statute. All such police powers are derived from and exercised under the sovereign authority of the State of Texas.

15. That the defendants Allwright and Liuzza as administrative officers of the State of Texas were required to take the same oath as officials of "general elections" pursuant to Article 3104 of the Revised Civil Statutes of Texas which provides in part that: "* * * such presiding judge shall select an associate judge and a clerk to assist in conducting the election; two supervisors may be chosen by any one-fourth of the party candidates, who, with the

judges and clerks, shall take the oath required of such officers in general election * * *." Defendants were under a duty to receive the vote of plaintiff and the votes of all other qualified electors presenting themselves to vote on the dates set for the primary election. Article 217 of the Penal Code of the State of Texas provides: "Any judge of any election who shall refuse to receive the vote of any qualified elector, who, when his vote is objected to shows by his own oath that he is entitled to vote, or who shall refuse to deliver an official ballot to one entitled to vote under the law, or who shall wilfully refuse to receive a ballot after one entitled to vote has legally folded and returned the same, shall be fined not to exceed Five Hundred Dollars." By Article 231 of the Penal Code of the State of Texas the term "election" as used in Article 217 and other articles of Chapter IV thereof, "means any election, either general or special, or primary * * *."

• 16. That Article 2955 of the Revised Civil Statutes of Texas sets forth identical qualifications for voting in both "primary" and "general" elections as follows:

"Qualifications for Voting.—Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided, that any voter who is subject to pay a poll tax under the laws of the State of Texas or ordinances of any city or town in this State shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preced-

ing such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title.

"If such voter shall have lost or misplaced said tax receipt he or she shall be entitled to vote upon making and leaving with the judge of the elections an affidavit that such tax was paid by him or her, or by his wife or by her husband before the said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost or misplaced. In any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in said county for six months next preceding such election. The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections."

17. That the plaintiff Lonnie E. Smith was, on the above-mentioned primary election days, and is, subject to none of the disqualifications of voters, as set out in Section 1 of Article 6 of the Texas Constitution and Section 2954 of the Revised Civil Statutes of Texas, i. e., he was and is over twenty-one years of age; he is not and never has been an idiot or lunatic; he is not and never has been a pauper supported by any county and has never been convicted of any felony. Plaintiff has met all qualifications for voting in the said primary election as set out in Article 2955 of the Revised Civil Statutes of Texas; i. e., he is a native born citizen of the United States, has resided in the State of Texas for more than one year preceding said elections and for more than six months within the district wherein he sought to vote. Plaintiff paid his poll tax prior to January

31, 1940, and holds receipt showing said poll tax was paid prior to January 31, 1940.

18. That pursuant to Article 2975 of the Revised Civil Statutes of Texas the County Collector of Taxes of Harris County, Texas, prepared a list of qualified voters for said County who had paid their poll tax prior to January 31, 1940, which included the name of the plaintiff herein. A copy of this list was, pursuant to Article 3121 of the Revised Statutes of Texas, delivered to the defendants Allwright and Liuzza in the official capacities as Judge and Associate Judge of Primary Elections.

19. That on the 27th day of July, 1940, and on the 24th day of August, 1940, there was held in the State of Texas and in Harris County in said State, a primary election for nomination of Democratic candidates for the United States Senate, House of Representatives and various State offices. Under Article 217 and 231 of the Penal Code of the State of Texas the defendants Allwright and Liuzza were under a duty to deliver an official ballot to all qualified electors who presented themselves at the polling place during the hours that the polling place was open. Plaintiff, on July 27, 1940, and during the regular hours when the polling place at Precinct 48 in Harris County was open on that date, presented his poll tax receipt to defendants Allwright and Liuzza with the request that he be permitted to cast his ballot in said primary election. The defendants refused to give the plaintiff a ballot or to permit him to cast a ballot in said election solely because of the race and color of the plaintiff.

20. That the defendants Allwright and Liuzza conspired with each other and others unknown to deprive the plaintiff and other qualified Negro electors of the State of Texas

of the right to vote in the Democratic primary election held in Harris County, Texas, on July 27, 1940, in violation of the United States Constitution and laws.

21. That the actions of defendants herein in denying to the plaintiff and other qualified Negro electors of the State of Texas the right to vote in the congressional primary for choice of Democratic candidates for Congress was an interference with the effective choice of the voters at the only stage of the election procedure when their choice would have any practical effect on the ultimate result, the choice of United States Senator and a Congressman to represent the district; the denial of this right constituted a denial or abridgement of a right established and guaranteed by the United States Constitution; i. e., Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen thereto.

22. There is between the parties an actual controversy as hereinbefore set forth.

23. The defendants by their illegal and wrongful acts complained of herein damaged this plaintiff in the sum of and to the extent of Five Thousand (\$5,000.00) Dollars.

24. That plaintiff and others similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of; they have no plain adequate or complete remedy to redress the wrong and illegal acts herein complained of other than this action for damages, for a declaration of rights and an injunction; any other remedy to which plaintiff and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause

further irreparable injury, damage, vexation and inconvenience to the plaintiff and those similarly situated.

Wherefore, plaintiff respectfully prays the Court that upon filing of this complaint, as may appear proper and convenient to the Court, the Court advance this case on the docket and order a speedy hearing of this action according to law, and upon such hearings.

1. That this Court adjudge and decree, and declare the rights and legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment or decree.
2. That this Court enter a judgment or decree declaring that the policy, custom or usage of the defendants, and each of them, in denying plaintiff and other qualified Negro electors the right to vote in Democratic primary elections in Texas, solely on account of their race or color, is unconstitutional as a violation of Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen of the United States Constitution.
3. That this Court issue a permanent injunction forever restraining and enjoining the defendants, and each of them, from denying qualified Negro elector the right to vote in Democratic primary elections in Texas solely because of color.
4. That the plaintiff have judgment for Five Thousand (\$5,000.00) Dollars damages.
5. That this Court will allow plaintiff his costs herein, and such further, other, additional or alternative relief as

may appear to the Court to be just and equitable in the premises.

LONNIE E. SMITH,
Plaintiff.

W. J. DURHAM,
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Article 2956. Absentee Voting.

Subdivision 1. Any qualified elector of this State who is absent from the county of his residence, or because of sickness or physical disability cannot appear at the poll place in the election precinct of his residence, on the day of holding any general, special, or primary election, may, nevertheless, cause his vote to be cast at such election in the precinct of his residence by compliance with one or other of the methods hereinafter provided for absentee voting.

Subdivision 2. Such elector shall make application for an official ballot to the county clerk in writing signed by the elector, or by a witness at the direction of said elector in case of latter's inability to make such written application because of physical disability. Such application shall be accompanied by the poll tax receipt or exemption certificate of the elector, or, in lieu thereof, his affidavit in writing that same has been lost or mislaid. If the ground of application be sickness or physical disability by reason of which the elector cannot appear at the polling place on election, a certificate of a duly licensed physician certifying as to such sickness or physical disability shall accompany the application.

Subdivision 3. At any time not more than twenty (20) days, nor less than three (3) days, prior to the date of such an election, such elector making his personal appearance before the county clerk of the county of his residence at his office and delivering to such clerk his application aforesaid, shall be entitled to receive from said clerk one official ballot which has been prepared in accordance with law for use in such election, which ballot is then and there, in the office of said clerk of said county, and in the presence of said clerk and of no other person, except the witness who is authorized to assist elector in certain cases as hereafter provided, to be marked by the elector, or by said witness in case of physical disability of elector, so as to conceal the marking, and same shall, in the presence of the clerk, be deposited in a ballot envelope furnished by said clerk, which envelope shall bear upon the face thereof the name, official title and post office address of such county clerk, and upon the other side a printed affidavit in substantially the following form, to be filled out and signed by the elector; provided, however, that in case of the physical disability of elector preventing him from filling out and signing such affidavit, then the witness who assisted the elector in marking his ballot shall fill out and

sign affidavit for and in behalf of elector and shall also sign his, witness' name, as prescribed in the following form:

State of

County of

I,, do solemnly swear that I am a Resident of Precinct No. in County, and am lawfully entitled to vote at the election to be held in said precinct on the day, 19....; that I am prevented from appearing at the polling place in said Precinct on the date of such election because of (illness), (physical disability), (or because of absence from County), (elector to signify one of the foregoing reasons); that the enclosed ballot expresses my wishes, independent of any dictation or undue persuasion of any person; that I did not use any memorandum or device to aid me in the marking of said ballot.

.....
Signature of Elector,

By

Name of Witness who assisted
elector in event of physical
disability.

Subdivision 4. At any time not more than twenty (20) days, nor less than three (3) days prior to the date of such an election, such elector who makes written application for a ballot as provided for in Subdivision 2 hereof, shall be entitled to have his ballot cast at such an election on compliance with the following provisions:

The application, including fifteen cents (15¢) to cover postage, shall be mailed to the County Clerk of the elector's residence whose duty it shall be forthwith to mail to such elector a blank official ballot and ballot envelope as provided in Subdivision 3, which ballot shall be marked by

elector, or by witness at the direction of said elector in case of the latter's inability to mark such ballot because of physical disability, in the presence of a Notary Public or other persons qualified under the law to make acknowledgments, and in the presence of no other person except said witness and/or such officer, and in such manner that such officer cannot know how the ballot is marked, and such ballot shall then in the presence of such officer be folded by the elector or by said witness in case of physical disability of said elector, deposited in said envelope, the envelope securely sealed, the indorsement filled out, signed and sworn to by the elector, or in case of physical disability, then by the said witness for and in behalf of said elector, and certified by such officer and then mailed by said officer, postage prepaid, to the County Clerk.

Subdivision 5. Upon receipt of any such ballot sealed in its ballot envelope duly indorsed, the clerk shall keep the same unopened until the second day prior to such election, and shall then enclose same together with the elector's application and accompanying papers, in a large or carrier envelope which shall be securely sealed and indorsed with the name and official title of such clerk, and the words "this envelope contains an absentee ballot, and must be opened only at the polls on election day", and the clerk shall forthwith mail same, or deliver it in person, to the presiding judge of election, or to any assistant judge of election, in said precinct.

And ballots mailed out by the county clerk within the legal time, but not received back by him on or before the third day prior to the election on the day of election, shall not be voted, but shall remain in the custody of the county clerk during the thirty (30) day period provided in Subdivision 6.

Subdivision 6. On the day of such election, and in the presence of the election officers, and the supervisors, if any, one of the judges of election shall, between the hours of 2:00 and 3:00 o'clock open the carrier envelope only, announce the elector's name and compare the signature upon the application with the signature upon the affidavit on the ballot envelope. In case the election board finds the affidavits duly executed, that the signatures correspond, that the applicant is a duly qualified elector of the precinct, and that he has not voted in person at said election, they shall open the envelope containing the elector's ballot in such manner as not to deface or destroy the affidavit thereon, take out the ballot therein contained without permitting same to be unfolded or examined and having indorsed the ballot in like manner as other ballots are required to be indorsed, deposit the same in the proper ballot box and enter the elector's name in the poll list the same as if he had been present and voted in person. If the ballot be challenged by any election officer, supervisor, party challenger, or other person, the grounds of challenge shall be heard and decided according to law, including the consideration of any affidavits submitted in support of or against such challenge. If the ballot be admitted, the words "absentee voter" shall be set down opposite the elector's name on the poll list. If the ballot be not admitted, there shall be indorsed on the back thereof the word "rejected", and all rejected ballots shall be enclosed, securely sealed, in an envelope on which words "rejected absentee ballots" have been written, together with a statement of the precinct and the date of election, signed by the judges and clerks of election and returned in the same manner as provided for the return and preservation of official ballots voted at such election. In all cases the application poll tax receipt or exemption certification, ballot envelope and the affidavits and certificates accompanying same shall be returned by the officers of election to the country clerk, who shall keep all such papers except poll

tax receipts and exemption certificates for one (1) year and shall return poll tax receipts and exemption certificates to the voter at any time after the same have been returned to him except in case of challenge when such poll tax receipts and exemption certificates shall be held thirty (30) days and as much longer thereafter as any Court or reviewing authority may direct.

Subdivision 7. Whenever it shall be made to appear to the officers of elections that any elector whose ballot has been marked and forwarded as hereinbefore provided, has since died, then the ballot of such deceased voter shall not be deposited in the ballot box, but shall be returned as in the case of other rejected ballots; provided, however, the casting of the ballot of a deceased voter shall not invalidate the election.

Subdivision 8. The county clerk shall post at a conspicuous place in his office, for public inspection, a complete list of those to whom ballots have been delivered or sent out under this Article, stating thereon the elector's name, age, occupation, precinct of residence and poll tax number or exemption certificate number, and the date on which ballot was delivered or mailed which list shall be kept up from day to day. The applications, poll tax receipts, exemption certificates, or affidavits of loss thereof, shall also be open to public inspection at regular office hours, but under such reasonable rules and regulations as the county clerk may adopt to safeguard the same and to reasonably economize his own time while they are in his keeping.

Subdivision 9. Any of the duties by this Article committed to the county clerk may be performed at the county clerk's office by one or more deputies specially designated in writing by the county clerk to act in connection with the election stated in the appointment.

Subdivision 10. The county clerks, their deputies and officers acting under this Article shall be considered as judges or officers of election within the scope of Articles 215 to 231, inclusive, of the Penal Code of Texas, and all amendments thereto, and be punishable as in said Articles respectively, provided in the case of judges or officers of election. Acts 1905, 1st C. S., p. 520; Acts 1917, 1st C. S., p. 62; Acts 1920, 4th C. S., p. 10; Acts 1921, p. 217; Acts 1923, p. 318; Acts 1931, 42nd leg., p. 180, ch. 105; Acts 1933, 43rd Leg., p. 5, ch. 4; Acts 1935, 44th Leg., p. 700, ch. 300, Section 1; Acts 1935, 44th Leg., 2nd C. S., p. 1700, ch. 437, Section 1.

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APPENDIX "B".

Article 2954. Not Qualified to Vote:

The following classes of persons shall not be allowed to vote in this State:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony, except those restored to full citizenship and right of suffrage, or pardoned.
5. All soldiers, marines and seamen employed in the service of the Army or Navy of the United States. Acts 1st C. S. 1905, p. 520.

Article 2955. Qualifications for Voting:

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years

and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided that any voter who is subject to pay poll tax under the laws of this State or ordinances of any city or town in this State, shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title. If such voter shall have lost or misplaced said tax receipt, he or she shall be entitled to vote upon making and leaving with the judge of the election an affidavit that such tax was paid by him or her, or by his wife or by her husband before said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost or misplaced. In any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then in addition to the foregoing qualifications, the voter must have resided in said county for six months next preceding such election. The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections. Act 1st C. S. 1905, p. 520; Acts 1st C. S. 1917, p. 62; Acts 4th C. S. 1920, p. 10; Acts 1921, p. 217; Acts 1923, p. 318.

"APPENDIX C."

Summary and Comparison of Provisions of Revised Statutes of Texas for Elections.

Election Labeled "General Election" and Held November 5, 1940.

1. Held under compulsion of Article 2930 of Revised Civil Statutes of Texas, 1925.
2. Date fixed by Article 2930.
3. Article 2930 fixes time of day for holding election.
4. Article 2939 requires that all election officials shall be qualified voters.
5. Article 2955 fixes same qualifications for voting in this election as in "statutory primary election".

Election Labeled "Primary Election" Held July 27, 1940.

1. Held under compulsion of Article 3101 of Revised Civil Statutes of Texas, 1925.
2. Date fixed by Article 3102.
3. Article 2930 fixes time of day for holding election.
4. Article 2939 requires that all election officials shall be qualified voters.
5. Article 2955 fixes same qualifications for voting in this election as in election labeled "general election".

6. Article 2956 (Absentee Voting) is same for this election for "statutory primary election."
 7. Article 2978 provides that only Official Ballot shall be used.
 8. Articles 2980-2981 provide form of ballots and how to mark ballot.
 9. Article 2984 fixes the number of ballots provided.
 10. Articles 2986, 2987, and 2990 provide for voting booths, guard rails, and ballot boxes for this election.
 11. Article 2998 fixes oath to be taken by officials in this election.
 12. Power of judges fixed by Article 3002 as follows:
6. Article 2956 (Absentee Voting) is the same for this election as for general election.
 7. Article 2978 provides that only official Ballot shall be used.
 8. Articles 3109, 3110 provided form and contents of ballot. Also, Art. 3109 fixes method of marking ballot.
 9. Article 3109 fixes number of ballots to be provided.
 10. Article 3120 provides that voting booths, guard rails, and ballot boxes of "general election," may be used in compulsory statutory primary election.
 11. Article 3104 requires officials of this election to take same oath as officials of "general election".
 12. Power of judges fixed by Article 3105 as follows:

Election Labeled "General Election" and Held
November 5, 1940.

"Judges of election are authorized to administer oaths to ascertain all facts necessary to a fair and impartial election. The presiding judge of election, while in the discharge of his duties as such, shall have the power of the District Judge to enforce order and keep the peace. He may appoint special peace officers to act as such during the election and may issue warrants of arrest for felony, misdemeanor or breach of peace committed at such election, directed to the sheriff or any constable of the county, or such special peace officer, who shall forthwith execute any such warrants, and, if so ordered by the presiding judge, confine the party arrested in jail during the election or until the day after election, when his case may be examined into, before some magistrate, to whom the presiding judge shall report it; but the

Election Labeled "Primary Election" Held
July 27, 1940.

"Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling places, and shall arrest, or cause to be arrested, any one engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

party arrested shall first be permitted to vote, if entitled to do so, unless he is drunk from the use of intoxicating liquor, then he shall not be permitted to vote until he is sober."

13. Articles 3003 to 3025 contain elaborate provisions for securing purity of the ballot box.

13. Article 3122 provides:

"The same precautions required by law to secure the purity of the ballot box in general election, in regard to the ballot boxes, locking the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections."

14. Article 3028 requires delivery of sealed ballot boxes containing ballots, etc., to County Clerk after this election.

14. Article 3128 requires delivery of sealed ballot boxes containing ballots, etc., to County Clerk after this election.

15. Article 3041 provides for contest of this election before District Court.

15. Article 3146 provides for contest of this election before District Court.

APPENDIX D.

Summary of Election Statistics (a).

Date	Gubernatorial		Senatorial		Presidential	
	Democrats	Others	Democrats	Others	Democrats	Others
1845	9,526	52	.....	.....	.....	.....
1847	13,536	1,231	.....	.....	.....	.....
1848	.....	.....	.....	.....	.....	.....
1849	21,696	.....	.....	.....	10,668	4,509
1851	25,238	3,071	.....	.....	.....	.....
1852	.....	.....	.....	.....	.....	.....
1853	26,515	9,178	.....	.....	13,044	4,995
1855	27,421	17,991	.....	.....	.....	.....
1856	.....	.....	.....	.....	.....	.....
1857	32,552	28,678	.....	.....	31,169	15,639
1859	27,500	36,288	.....	.....	.....	.....
1860	.....	.....	.....	.....	.....	.....
1861	57,343	.....	.....	.....	47,548	15,438
1863	29,966	1,070	.....	.....	.....	.....
1866	49,277	12,168	.....	.....	.....	.....
1869	380	78,993	.....	.....	.....	.....
1872	.....	.....	.....	.....	2,580	114,027

1873	General	150,581	47,719	.....	.....	.....	.....
1876	General	.....	.....	.....	.....	104,803	44,803
1878	General	158,933	78,503	.....	.....	.....	.....
1880	General	166,101	98,103	.....	.....	156,428	85,928
1882	General	150,891	102,835	.....	.....	.....	.....
1884	General	212,234	114,007	.....	.....	225,309	99,996
1886	General	228,776	84,524	.....	.....	.....	.....
1888	General	250,338	98,447	.....	.....	234,883	122,630
1890	General	262,432	79,977	.....	.....	.....	.....
1892	General	323,881	111,586	.....	.....	239,148	183,297
1894	General	216,373	244,498	.....	.....	.....	.....
1896	General	298,528	241,250	.....	.....	375,480	248,878
1898	General	291,548	118,006	.....	.....	.....	.....
1900	General	303,586	145,753	.....	.....	267,337	146,794
1902	General	266,076	90,074	.....	.....	.....	.....
1904	General	206,167	74,244	.....	.....	.....	.....

(a) Sources:

Vote for Governor—Primary, & General Elections—1845-1916—Platforms of Political Parties by Ernest William Winkler; 1916-38—Texas Almanac & Industrial Guide for 1939-40; 1940—Texas Newspapers—Incomplete Returns.

Vote for Senators—Primary Elections—Texas Newspapers, Congressional Directory and Senator Connally's Office—Incomplete Returns; General Elections—1916-18—World Almanac; 1922-36—Congressional Directories; 1940—Comment from Galveston Daily News.

Vote for President—General Elections—1848-1916—Platforms of Political Parties in Texas; 1920—World Almanac 1921; 1924-36—Texas Almanac & Industrial Guide; 1940—Houston Post—Incomplete returns.

For more detailed information refer to footnotes on following tables.

Date		Gubernatorial-		Senatorial		Presidential	
		Democrats	Others	Democrats	Others	Democrats	Others
1906	Primary	294,106	.....	.....	.....	.....	.....
	General	149,105	34,599	.....	.....	.....	.....
1908	Primary	320,067	.....	.....	.....	.....	.....
	General	218,956	81,808	.....	.....	216,737	76,491
1910	Primary	357,380	.....	.....	.....	.....	.....
	General	174,596	44,217	.....	.....	.....	.....
1912	Primary	395,995	.....	317,018	.....	221,589	83,531
	General	233,073	66,664	(b)	.....	.....	.....
1914	Primary	428,620	.....	.....	.....	.....	.....
	General	175,804	34,905	.....	.....	.....	.....
1916	1st Pri.	421,903	.....	386,597	.....	.....	.....
	2nd Pri.	.....	.....	257,280	.....	.....	.....
	General	296,667	66,915	301,757	69,428	285,980	85,741
1918	Primary	678,491	.....	(c)	.....	.....	.....
	General	148,982	28,373	248,742	47,526	.....	.....

(b) Sheppard elected by the legislature to fill vacancy and for full term beginning 3/4/13.

(c) Sheppard's name on primary ballot, but was unopposed. No figures on election in the press.

1920	1st Pri.	449,800	.....	.....	.....	.....	.....
	2nd Pri.	448,777	.....	.....	.....	.....	.....
	General	289,188	192,543	.....	.....	289,688	199,018
1922	1st Pri.	589,926	.....	596,818	.....	.....	.....
	2nd Pri.	.....	.....	553,638	.....	.....	.....
	General	334,199	73,329	264,260	130,744	.....	.....
1924	1st Pri.	703,123	.....	575,042	.....	.....	.....
	2nd Pri.	729,770	.....	.....	.....	.....	.....
	General	422,558	294,970	591,913	101,208	478,425	170,781
1926	1st Pri.	821,234	15,439 (d)	.....	.....	.....	.....
	2nd Pri.	766,318	.....	.....	.....	.....	.....
	General	233,068	32,439	.....	.....	.....	.....
1928	1st Pri.	737,921	.....	581,000	.....	.....	.....
	2nd Pri.	.....	.....	525,825	.....	.....	.....
	General	582,972	124,034	566,139	130,714	341,032	367,967
1930	1st Pri.	833,442	1,964 (e)	651,619	1,758 (e)	.....	.....
	2nd Pri.	857,773	.....	.....	.....	.....	.....
	General	252,738	62,224	266,550	40,151	.....	.....

(d) First state-wide primary held by the Republican Party.

(e) Second Republican Primary—Incomplete returns from 31 Counties only.

Date		Gubernatorial		Senatorial		Presidential	
		Democrats	Others	Democrats	Others	Democrats	Others
1932	1st Pri.	967,490	.....	.....	.....	.....	.....
	2nd Pri.	951,490	.....	.....	.....	.....	.....
	General	528,986	320,552	.....	.....	753,304	101,613
1934	1st Pri.	994,011	..... (f)	662,487	(f)	.....	.....
	2nd Pri.	955,593	.....	.....	.....	.....	.....
	General	421,422	15,655	439,375	15,033	.....	.....
1936	Primary	1,115,485	674,798	.....	.....	.....	.....
	General	782,083	60,132	774,975	62,285	734,485	105,834
1938	Primary	1,115,485	.....	.....	.....	.....	.....
	General	473,526	11,762	.....	.....	.....	.....
1940	Primary	875,520	.....	1,088,346	.....	.....	.....
	General	469,046	19,340	.....	.....	777,193	183,640

(f) Third Republican Primary—No figures listed in papers. Candidates actually selected by State Republican Committee prior to primary, which was held only to comply with state law.

TEXAS GUBERNATORIAL ELECTIONS.

General.

Date	Name	Democrat	Republican	Others	Total
1845*	J. Pinckney Henderson	7,853			
	James B. Miller	1,673			
		<hr/>			
		9,526	.....	52	9,578
1847	George T. Wood	7,154			
	James B. Miller	5,106			
	Nicholas H. Darnell	1,276			
		<hr/>			
		13,536	.....	1,231	14,767
1849	P. Hansborough Bell	10,310			
	George T. Wood	8,754			
	John T. Mills	2,622			
		<hr/>			
		21,696	.....	.....	21,696

*—1845-1916—Vote for Governor—Source: Platforms of Political Parties in Texas—University of Texas Bulletin 1916-No. 63—Ernest William Winkler, Ref. Librarian & Curator of Texas Books, Texas University.

Date	Name	Democrat	Republican	Others	Total
1851	P. Hansborough Bell	13,595			
	M. T. Johnson	5,262			
	John A. Greer	4,061			
	Thomas J. Chambers	2,320			
		<hr/>			
	Ben H. Epperson (Whig)	25,238	2,971	100	28,309
1853	Elisha M. Pease	13,091			
	George T. Wood	5,983			
	Lemuel D. Evans	4,677			
	Thomas J. Chambers	2,449			
	John W. Dancy	315			
		<hr/>			
	William B. Ochiltree (Whig)	26,515	9,178	.....	35,693
1855	Elisha M. Pease	26,336			
	George T. Wood	276			
	M. T. Johnson	809			
		<hr/>			
	D. C. Dickson (Know-Nothing)	27,421	.....	17,965	45,412
				26	

1857	Hardin R. Runnels	32,552			
	Sam Houston (Independent)		28,678	61,230	
1859	Sam Houston (Independent)		36,227		
	Hardin R. Runnels	27,500			
1861	Francis H. Lubbock	21,854	61	63,788	
	Edward Clark	21,730			
	Thomas J. Chambers	13,759			
		<hr/>			
	Pendleton Murrah	57,343		57,343	
1863	Thomas J. Chambers	17,511			
		12,455			
		<hr/>			
		29,966			
1866	J. W. Throckmorton	49,277	1,070	31,036	
	Elisha M. Pease				
1869	Edmund J. Davis (Radical R.)		12,168	61,445	
	Andrew J. Hamilton (Conservative R.)		39,901		
			39,092		
		<hr/>			
		78,993			
	Hamilton Steward	380		79,373	

Date	Name	Democrat	Republican	Others	Total
1873	Richard Coke	150,581			
	William Chambers		47,719		198,300
1878	Oram M. Roberts	158,933			
	A. B. Norton		23,402		
	W. H. Hamman (Greenback)			55,002	
				99	237,436
1882	John Ireland	150,891			
	George W. Jones (Greenback-Independent)			102,501	
				334	253,725
1884	John Ireland	212,234			
	A. B. Norton		25,557		
	George W. Jones (Independent)			88,450	326,241
1886	Lawrence S. Ross	228,776			
	A. M. Cochran		65,236		
				19,288	313,300
1888	Lawrence S. Ross	250,338			
	Marion Martin (Fusion)			98,447	348,785
1890	James S. Hogg	262,432			
	Webster Flanagan		77,742		
				2,235	342,409

1892	James S. Hogg	190,486			
	George Clark	133,395			
		<hr/>			
		323,881			
	A. J. Houston (Reform R.)	1,322	1,322	110,364	435,467
	.....	1,322			
1894	Charles A. Culberson	216,373			
	W. K. Makemson (Regular R.)	57,147			
	John B. Schmitz (Reform R.)	5,304			
		<hr/>			
		62,451	182,047	460,871	
				
1896	Charles A. Culberson	298,528			
	.....		241,250	539,778	
1898	Joseph D. Sayers	291,548			
	.....		118,006	409,554	
1900	Joseph D. Sayers	303,586			
	R. E. Hanney	112,864			
	.....		32,889	449,339	

Date	Name	Democrat	Republican	Others	Total
1902	S. W. Lanham	266,076			
	George W. Burkett		65,706		
	.....			24,368	356,150
1904	S. W. T. Lanham	206,167			
	James G. Lawden		56,865		
	.....			17,379	280,411
1906	Thomas M. Campbell	149,105	23,771		
	C. A. Atchison (Reorganized)		5,395		
		<hr/>		
	.....		29,166	5,433	183,704
1908	Thomas M. Campbell	218,956			
	John M. Simpson		73,305		
	.....			8,500	300,764
1910	Oscar B. Colquitt	174,596			
	J. O. Terrell		26,191		
	.....			18,026	218,813
1912	Oscar B. Colquitt	233,073			
	C. W. Young		22,914		
	.....			43,750	299,737

1914	James E. Ferguson	175,804	.....	.....	.....
	John W. Philp .....	.....	11,411	.....	.....
	.....	.....	.....	27,494	214,709
1916	James E. Ferguson	296,667	.....	.....	.....
	R. B. Creager .....	.....	49,118	.....	.....
	.....	.....	.....	17,797	363,582
1918**	W. P. Hobby	148,982	.....	.....	.....
	Charles R. Boynton .....	.....	26,713	.....	.....
	.....	.....	.....	1,660	177,355
1920	Pat M. Neff	289,188	.....	.....	.....
	J. G. Culbertson .....	.....	90,217	.....	.....
	.....	.....	.....	102,326	481,731
1922	Pat M. Neff	334,199	.....	.....	.....
	W. H. Atwell .....	.....	73,329	.....	407,528
1924	Mrs. Miriam A. Ferguson	422,558	.....	.....	.....
	George C. Butte .....	.....	294,970	.....	717,528
1926	Dan Moody	233,068	.....	.....	.....
	H. H. Haines .....	.....	31,531	.....	.....
	.....	.....	.....	908	265,507

**—1916-1938—Vote for Governor—Source: Texas Almanac & Industrial Guide—1939-40.

Date	Name	Democrat	Republican	Others	Total
1928	Dan Moody	582,972			
	W. H. Holmes		120,504		
				3,530	707,006
1930	Ross S. Sterling	252,738			
	William E. Talbot		62,224		314,962
1932	Mrs. Miriam A. Ferguson	528,986			
	Orville Bullington		314,807		
				5,745	849,538
1934	James V. Allred	421,422			
	D. E. Waggoner		13,534		
				2,121	437,077
1936	James V. Allred	782,083			
	C. O. Harris		58,842		
				1,290	842,215
1938	W. Lee O'Daniel	473,526			
	Alexander Boynton		10,940		
				822	485,288

1940***	W. Lee O'Daniel	469,046	.....
	George C. Hopkins	19,116	.....
		224	488,386

TEXAS GUBERNATORIAL ELECTIONS.

Democratic Primaries.

Date	Name	First Primary	Second Primary	Total Vote
1906*	Thomas M. Campbell	90,345		
	M. M. Brooks	70,064		
	O. B. Colquitt	68,529		
	Charles K. Bell	65,168		294,106

***—1940—Vote for Governor—Source: Dallas Times-Herald 11/6/40 and Galveston News 11/7/40—Incomplete returns from 252 Counties.

****—From Texas Almanac—1939-40, P. 382—Political Parties in Texas—"The Democratic Party has been dominant in Texas throughout the state's history and has won in all major political contests with the exceptions of the defeat of Hardin R. Runnels (Democrat) by Sam Houston (Know-Nothing) in the gubernatorial contest of 1859, and the defeat in this state of Al Smith by Herbert Hoover in the presidential contest of 1928, and in these instances personal factors rather than political party alignment were responsible for the result. The same can be said of the large vote cast for George C. Butte (Republican) and Orville Bullington (Republican) running against Mrs. Miriam A. Ferguson in 1924, and 1932, respectively. The only serious threat to Democratic control in Texas history was that of the Populist or People's Party, which reached its peak in the election of 1896 when its nominee, J. C. Kearby, lost to Charles A. Culberson by a relatively narrow margin of 298,582 to 238,692."

*—Vote for Governor—1906-38—Source: Texas Almanac & State Industrial Guide—1939-40.

Date	Name	First Primary	Second Primary	Total Vote
1908	Thomas M. Campbell	202,608		
	R. R. Williams	117,459		320,067
1910	O. B. Colquitt	146,526		
	William Poindexter	79,711		
	R. V. Davidson	53,187		
	Cone Johnson	76,050		
	J. Marion Jones	1,906		357,380
1912	O. B. Colquitt	218,812		
	William F. Ramsey	177,183		
1914	James E. Ferguson	237,062		395,995
	Thomas H. Ball	191,558		
1916	James E. Ferguson	240,561		428,620
	Charles H. Morris	174,611		
	H. G. Marshall	6,731		
1918	W. P. Hobby	461,479		421,903
	James E. Ferguson	217,012		
1920	Pat M. Neff	149,818		678,491
	Robert E. Thomason	99,002		
	Joseph W. Bailey	152,340		
	Ben F. Looney	48,640		449,800

	Pat M. Neff	264,075	445,777
	Joseph W. Bailey	184,702	
1922	Pat M. Neff	318,000	
	W. W. King	18,368	
	Fred S. Rogers	195,941	
	Harry T. Warner	57,617	589,926
1924	Felix D. Robertson	193,508	
	George W. Dixon	4,035	
	W. E. Pope	17,136	
	Joe Burkett	21,720	
	Mrs. Miriam A. Ferguson	146,424	
	Lynch Davidson	141,208	
	V. A. Collins	24,864	
	T. W. Davidson	125,011	
	Thomas D. Barton	28,917	703,123
	Mrs. Miriam A. Ferguson	413,751	
	Felix D. Robertson	316,019	729,770
1926	Lynch Davidson	122,449	
	Mrs. Miriam A. Ferguson	283,482	
	Mrs. Kate M. Johnston	1,029	
	Dan Moody	409,732	

Date	Name	First Primary	Second Primary	Total Vote
	Mrs. Edith E. Wilmans	1,580		
	O. F. Zimmerman	2,962		821,234
	Mrs. Miriam A. Ferguson			
	Dan Moody		270,595	
1928	William E. Hawkins	32,076	495,723	766,318
	Dan Moody	442,080		
	Louis J. Wardlaw	245,508		
	Mrs. Edith E. Williams	18,237		
1930	Mrs. Miriam A. Ferguson	242,959		737,921
	Thomas B. Love	87,068		
	Paul Loven	2,724		
	Earle B. Mayfield	54,459		
	Barry Miller	54,652		
	C. C. Moody	4,382		
	Frank Putnam	2,365		
	Clint C. Small	138,934		
	Ross S. Sterling	170,754		
	James Young	73,385		
	C. E. Walker	1,760		
	Ross S. Sterling			833,442
	Mrs. Miriam A. Ferguson		473,371	
			384,402	857,773

1932

Roger Q. Evans	3,974
Mrs. Miriam A. Ferguson	402,238
C. A. Frakes	2,338
J. Ed. Glenn	2,089
Tom F. Hunter	220,391
Frank Putnam	2,962
Ross S. Sterling	296,383
M. H. Wolfe	32,241
George W. Armstrong	5,312

967,490

473,846

477,644

951,490

45

1934

C. C. McDonald	206,007
James V. Allred	297,656
Clint C. Small	124,206
Edgar Witt	62,208
Edward K. Russell	4,408
Mauzy Hughes	58,187
Tom Hunter	241,339

994,011

497,808

457,785

955,593

Date	Name	First Primary	Second Primary	Total Vote
1936	James V. Allred	553,219		
	P. Pierce Brooks	33,391		
	F. W. Fisher	145,877		
	Tom F. Hunter	239,460		
	Roy Sanderford	81,170		1,053,117
	W. Lee O'Daniel	573,166		
	Ernest O. Thompson	231,630		
	William G. McCraw	152,278		
	Tom F. Hunter	117,634		
	S. T. Brogdon	892		
	Joseph King	773		
	Clarence C. Farmer	3,869		
	P. D. Renfro	8,127		
	Karl A. Crowley	19,753		
	Clarence R. Miller	667		
1940	James A. Ferguson	3,800		
	Thomas Self	1,405		
	Marvin P. McCoy	1,491		1,115,485
	R. P. Condron	2,518		
	Alron B. Davis	3,853		

Miriam A. Ferguson	72,392
Harry Hines	95,285
W. Lee O'Daniel	467,503
Jerry Sadler	48,546
Ernest O. Thompson	185,423
	875,520

TEXAS GUBERNATORIAL ELECTIONS.

Republican Primaries.

Date	Name	Primary Vote	Total Vote
1926	*H. H. Haines	11,215	
	E. P. Scott	4,074	15,289
1930	**K. E. Exum	1,015	
	George C. Butte	670	
	— Grant	263	
	— Gaines	16	1,964
1934	***		

**—Votes for Governor—1940—Source: Dallas Morning News 7/29/40—Incomplete returns from 242 out of 254 Counties.

*—First state-wide primary held by the Republican Party.

**—Figures from the Houston Post 7/29/30—Incomplete returns from 31 Counties.

***—No figures listed in the papers. The Dallas News 7/29/34 states that the Republican Primaries were a formality to conform with Primary Law, since the party polled in excess of 100,000 votes in 1932. Candidates were actually selected by the State Republican Committee prior to primary date.

TEXAS SENATORIAL ELECTIONS.

General.

Date	Name	Democrat	Republican	Others	Total
1916	*Charles A. Culberson	301,757			
	— Atcheson		48,717		
1918	Morris Sheppard	248,742		20,711	371,185
	— Flanagan		36,164		
1922	**Earle B. Mayfield	264,260			
	George E. Peddy (Independent D. & R.)			12,362	297,268
1924	Morris Sheppard	591,913	130,744		395,004
	T. M. Kennerly		101,208		693,121
1928	Tom Connally	566,139			
	T. M. Kennerly		129,910		
				804	696,853
1930	Morris Sheppard	266,550			
	D. H. Haesley		39,047		
				1,104	306,701

*—Vote for Senators—1916-18—Source: World Almanac 1918-21.

**—Vote for Senators—1922-36—Source: Congressional Directories—Statistics.

1934	Tom Connally	339,375	.....	.....	.....
	U. S. Goens	12,895	.....	.....	.....
			2,138	.....	454,408
1936	Morris Sheppard	774,975	.....	.....	.....
	Carlos G. Watson	59,491	.....	.....	.....
			2,794	.....	837,260
1940	***Tom Connally	.....	.....	.....	.....
	George I. Shannon	.....	.....	.....	.....

TEXAS SENATORIAL ELECTIONS.

Democratic Primaries.

Date	Name	First Primary	Second Primary	Total Vote
1912	J. F. Wolters	129,740	.....	.....
	Morris Sheppard	154,130	.....	.....
	C. B. Randell	29,635	.....	.....
	Matt Zollner	3,513	.....	317,018

***—Texas papers of November 1940 do not list election returns for Senator irregular tabulations. From the Galveston Daily News, 11/6/40: "Although Senator Tom Connally and several of the congressional delegation had Republican and other opponents, the election bureau did not gather or tabulate returns, so apparent was their election." Senator Connally's office on November 30th had no returns from the general election, the clerk stating that the general election "doesn't count in Texas."

Date	Name	First Primary	Second Primary	Total Vote
1916	Dallas News 7/29/12. (Morris Sheppard elected by the Legislature to fill vacancy to 3/3/13 and for full term beginning 3/4/13.)			
	T. M. Campbell	64,272		
	S. P. Brooks	77,246		
	R. L. Henry	35,753		
	O. B. Colquitt	115,430		
	John Davis	9,919		
	Charles A. Culberson	83,977		386,597
	Dallas News 7/30/16: Incomplete returns from 246 of 253 Counties.			50
	Charles A. Culbertson		163,182	
	O. B. Colquitt		94,098	
	Dallas News 9/3/16: Incomplete returns from 230 of 253 Counties.			257,280
1918	Morris Sheppard			
	Houston Post 7/26/18: Sheppard unopposed. Listed as only candidate in primaries.			

1922

Charles A. Culberson	103,999
James E. Ferguson	131,308
Robert L. Henry	44,624
Earl B. Mayfield	164,910
Clarence Ousley	63,295
Cullen F. Thomas	89,682
	596,813

Congressional Directory, May, 1924
Biography of Senator Mayfield.

James E. Ferguson	249,425
Earle B. Mayfield	304,213
	553,638

Dallas News 8/30/22: Incomplete
returns from 229 Counties of 253.

1924

Fred W. Davis	135,374
John F. Maddox	67,558
Morris Sheppard	372,110
	575,042

Dallas News 8/1/24: Incomplete
returns from 249 of 252 Counties.

1928

Tom Blanton	106,095
Tom Connally	156,291
Minnie Fisher Cunningham	25,915
Earle B. Mayfield	172,272

Date	Name	First Primary	Second Primary	Total Vote
	Jeff McLemore	8,871		
	Alvin M. Owsley	111,456		581,000
	Dallas News 7/31/28: Incomplete returns from 245 of 253 Counties.			
	Tom Connally		290,549	
	Earle B. Mayfield		235,276	525,825
1930	Robert Lee Henry	151,978		
	C. A. Mitchner	35,074		
	Morris Sheppard	464,567		651,619
	Houston Post 7/31/30: Incomplete.			52
1934	Joseph Weldon Bailey, Jr.	246,796		
	Tom Connally	388,516		
	Guy B. Fisher	27,175		662,487
	Dallas News 7/30/34: Incomplete returns from 239 of 254 Counties.			
1936	Richard C. Bush	27,787		
	Joe H. Eagle	90,030		
	Guy B. Fisher	65,825		
	Joseph A. Price	31,301		

J. Edward Glenn 22,189
 Morris Sheppard 437,666
 Houston Post 7/27/36: Incomplete
 returns from 241 of 254 Counties.

674,798

1940

A. P. Belcher 66,962
 Tom Connally 923,219
 Guy B. Fisher 98,165

1,088,346

Figures from Senator Connally's Office
 11/30/40.

TEXAS SENATORIAL ELECTIONS.

Republican Primaries:

Date
 1930

Primary Vote

Total Vote

D. J. Haesley 800
 Harve H. Haines 362
 Harris 596

Houston Post 7/29/30: Incomplete returns from 31
 Counties.

1,758

1934

Dallas News 7/29/34: The Republican Primaries
 were a formality to conform with Primary Law, since

the Party polled in excess of 100,000 votes in 1932. Candidates actually selected by the State Republican Committee prior to primary date--no figures being listed in the papers.

TEXAS PRESIDENTIAL ELECTIONS.

General.

Date	Name	Democrat	Republican	Others	Total
1848	Lewis Cass	10,668			
X	**Zachary Taylor (Whig)		4,509		15,177
1852	X Franklin Pierce	13,044			
	Winfield Scott		4,995		18,039
1856	X James Buchanan	31,169			
	Millard Fillmore (Know-Nothing)			15,639	46,808
1860	John C. Breckinridge	47,548			
	John Bell (Constitutional Union)			15,438	62,986

*--Vote for President--1848-1916--Source, Platforms of Political Parties in Texas--University of Texas Bulletin 1916--No. 63--Ernest William Winkler--Ref. Librarian & Curator of Texas Books University of Texas.

**--X Indicates successful candidate.

[illegible]

Date	Name	Democrat	Republican	Others	Total
1900	William J. Bryan	267,337			
X	William J. McKinley		121,173		
				25,621	414,131
1904	Alton B. Parker	167,200			
X	Theodore Roosevelt		51,242		
				15,566	234,008
1908	William J. Bryan	216,737			
X	William Howard Taft		65,602		
				10,889	293,228
1912	Woodrow Wilson	221,589			
X	William Howard Taft		28,853		
				54,678	305,120
1916	Woodrow Wilson	285,980			
X	Charles Evans Hughes		64,673		
				21,068	371,721
1920	***James Cox	229,688			
X	Warren G. Harding		115,640		
				83,378	488,706

1924	**** James Davis	478,425	.....	.....	.....
X	Calvin Coolidge	128,240	.....	42,541	649,206
1928	Alfred E. Smith	341,032	.....	.....	.....
X	Herbert Hoover	.....	367,036	.....	.....
	.....	.....	.....	931	708,999
1932	X Franklin D. Roosevelt	753,304	.....	.....	.....
	Herbert Hoover	.....	96,682	.....	.....
	.....	.....	.....	4,931	854,917
1936	X Franklin D. Roosevelt	734,485	.....	.....	.....
	Alfred Landon	.....	103,711	.....	.....
	.....	.....	.....	2,123	840,319
1940	X Franklin D. Roosevelt	777,193	.....	.....	.....
	Wendell Willkie	.....	183,307	.....	.....
	.....	.....	.....	333	960,833

****—Vote for President—1924-36—Source: Texas Almanac & Industrial Guide—Years 1926 to 1938.

*****—Vote for President—1940—Source: Houston Post 11/8/40—Incomplete returns from 253 Counties.
 *****—From Texas Almanac—1939-40—P. 382—Political Parties in Texas—"The Democratic Party has been dominant in Texas throughout the state's history and has won in all major political contests with the exceptions of the defeat of Hardin R. Runnels (Democrat) by Sam Houston (Know-Nothing) in the gubernatorial contest of 1859, and the defeat in this state of Al Smith by Herbert Hoover in the presidential contest of 1928, and in these instances personal factors rather than political party alignment were responsible for the result."

TEXAS POPULATION—VOTING AGE.

		White			Free Colored			Slaves		
		Male	Female	Total	Male	Female	Total	Male	Female	Total
Over 20 yrs. of Age	1850	40,670	27,360	67,976	103	90	193	11,895	12,320	24,215
Over 20 yrs. of Age	1860*	106,070	75,446	181,516	78	85	163	37,678	37,272	74,950
		White			Colored					
		Male	Female	Total	Male	Female	Total			
	1870*	132,390	108,960	241,350	51,575	51,310	.....		
	1880**	303,154	237,827	540,981	82,622	82,070	.....		
	1890**	445,183	358,867	804,050	104,430	101,686	.....		
	1900**	621,109	532,856	1,153,965	141,413	139,185	.....		
		White			Negro			Other Races		
		Male	Female	Total	Male	Female	Total	Male	Female	Total
Over 21 yrs. Table #4.....	1910	864,147	753,971	1,618,118	171,944	169,690	341,634	368	202	1,070
Population Bulletin	1920	1,086,862	957,408	2,044,270	196,055	188,373	384,428	1,495	522	2,017
Texas-Census Bureau	1930	1,253,035	1,177,398	2,430,433	234,459	253,178	469,637	169,101	151,629	320,810

*—Indians included in "White".

**—Japanese, Chinese & Civilized Indians included in "Colored".

TEXAS POPULATION—VOTING AGE.

White			Free Colored			Slaves			Non-White	All Classes
Male	Female	Total	Male	Female	Total	Male	Female	Total	Total	Total
40,670	27,360	67,976	103	90	193	11,895	12,320	24,215	24,408	92,384
106,070	75,446	181,516	78	85	163	37,678	37,272	74,950	75,113	256,629
White			Colored						Non-White	All Classes
Male	Female	Total	Male	Female	Total					
132,390	108,960	241,350	51,575	51,310	.....	.....	.....	.....
303,154	237,827	540,981	82,622	82,070	.....	.....	.....	.....
445,183	358,867	804,050	104,430	101,686	.....	.....	.....	.....
621,109	532,856	1,153,965	141,413	139,185	.....	.....	.....	.....	280,598	1,434,563
White			Negro			Other Races			Non-White	All Classes
Male	Female	Total	Male	Female	Total	Male	Female	Total		
864,147	753,971	1,618,118	171,944	169,690	341,634	368	202	1,070		
1,086,862	957,408	2,044,270	196,055	188,373	384,428	1,495	522	2,017		
1,253,035	1,177,398	2,430,433	234,459	253,178	469,637	169,101	151,629	320,810		
									342,704	1,960,822
									386,445	2,430,715
									790,447	3,220,880

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Filed April 25, 1942.

**DEFENDANT'S ANSWER TO FIRST AMENDED BILL
OF COMPLAINT.**

(Title Omitted.)

To the Honorable Judge of said Court:

Come now the defendants, S. E. Allwright and James J. Liuzza, Election Judge and Associate Election Judge for the 48th voting precinct in Houston, Harris County, Texas, in the above entitled and numbered cause, and with leave of the Court first had and obtained files this their first amended answer to Plaintiff's First Amended Bill of Complaint, respectfully represent to the Court:

I.

In answer to lines 1, 2, 3 and part of 4 of the Plaintiff's First Amended Bill of Complaint, defendants especially deny that he is suing on behalf of all qualified Negro voters similarly situated in the State of Texas, who are believers and adherents of the tenets and principles of the Democratic Party. Defendants respectfully aver that plaintiff is suing entirely for himself.

II.

In answer to parts of line 10 and 11 of Plaintiff's First Amended Bill of Complaint, Defendants deny that they are appointed, qualified and acting as administrative officers of the State of Texas, etc., in answer to part of 11 to 14 inclusive, Defendants deny that unlawfully denied to Plaintiff and all other qualified Negro voters the right to vote in the statutory Democratic primary elections in Texas on July 27th, 1940, and August 24th, 1940, solely because of race or color. Defendants respectfully repre-

sent that they are not public officers, but are Democratic Party officials, and denied plaintiff of the right to vote in said Democratic primary election solely because of the mandatory instructions of the Democratic Party, more particularly and fully set out and described in paragraph numbered XXIII hereof.

III.

In answer to paragraph 1, beginning on the first page of Plaintiff's First Amended Bill of Complaint, Defendants deny that the jurisdiction of this Court is invoked under subdivision 1 of Section 41 of Title 28 of the United States Code. Defendants further deny that the jurisdiction of this Court is invoked under Sections 31 and 43 of Title 8 of the United States Code, in that the matter in controversy herein does not exceed, exclusive of interests and costs, the sum of \$3,000.00. The defendants further deny that the jurisdiction of this Court is also invoked under subdivision 11 of Section 41 of Title 28, or subdivision 14 of Section 41 of Title 28, of the United States Code because this is alleged an action to enforce the right of a citizen of the United States to vote in the State of Texas. Defendants respectfully represent that the allegations referred to in Plaintiff's First Amended Bill of Complaint are primary elections in which a political party has a right to prescribe qualifications for membership and participation therein, and is not an election within the intent and meaning of the Fourteenth, Fifteenth, and Seventeenth Amendments to the Constitution of the United States.

IV.

Defendants especially deny in answer to paragraph 2 of Plaintiff's Amended Bill of Complaint that this is a proceeding for a declaratory judgment and an injunction.

under Section 274D of the Judicial Code (United States Code, Title 28, Section 400), because it appears from the face of the plaintiff's First Amended Bill of Complaint that this is, in truth and in fact, a suit for \$5,000.00 damages against each of the Defendants, and an action herein for alleged relief by injunction would be moot at this time in view of the fact that the face of Plaintiff's First Amended Bill of Complaint shows that the elections occurred on July 27th, 1940, and August 24th, 1940. Defendants further deny that Plaintiff herein and the other Negro citizens similarly situated are qualified members of the Democratic Party and entitled to participate in the Democratic primary elections.

V.

Defendants especially deny so much of paragraph No. 4 of Plaintiff's First Amended Bill of Complaint as relates that "Plaintiff is a believer in the tenets of the Democratic Party". Defendants more especially deny that plaintiff is or ever has been a member of the Democratic Party or that he can become such or is entitled to membership therein, all as is more fully shown in paragraph No. XXIII hereof.

VI.

Defendants especially deny the allegations set out in paragraph 5 of Plaintiff's First Amended Bill of Complaint in that this is not such a suit as is of common and general interest of the members of the class represented by the Plaintiff, namely, Negro citizens of the United States and residents of the State of Texas, similarly situated, etc., in that the elections referred to in Plaintiff's First Amended Bill of Complaint were Democratic Party primaries, and not an election within the intent and mean-

ing of the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States.

VII.

In answer to paragraph 6 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the elections referred to were statutory elections or were held pursuant to the mandate of Article 3100 et seq. of the Revised Civil Statutes of Texas; Defendants especially deny that they were appointed and acting solely under authority of Articles 3104 and 3105 of the Texas Revised Civil Statutes.

VIII.

In answer to paragraph No. 7 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the elections referred to in Plaintiff's First Amended Bill of Complaint are elections within the intent and meaning of Sections 2 and 4 of Article 1 and Amendment Seventeen to the Constitution of the United States, or in Article 6 of the Texas Constitution and Article 2955 of the Revised Civil Statutes of Texas.

IX.

In answer to paragraph 9 of Plaintiff's First Amended Bill of Complaint, Defendants deny that the Democratic primaries are maintained solely by authority of the statutes of the State of Texas, because the holding of such primary election is in truth and in fact a political party affair.

X.

In answer to paragraph No. 10 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny

that candidates for the office of United States Senator from Texas can only be placed on the official ballot in the general election after nomination at statutory primary elections.

XI.

In answer to paragraph No. 11 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that Article 3101 of Revised Civil Statutes of Texas require that candidates for the United States Congress, Governor and State officials of political parties that cast 100,000,000 votes or more be nominated in statutory primary elections apply in that any attempt to manage or control the party affairs of a political party, and more especially the Democratic Party, is unauthorized and of no effect.

XII.

In answer to paragraph No. 13 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the holding of the primary elections under the laws of the State of Texas is an essential governmental function of the State of Texas, because the holding of such primary elections is in truth and in fact a political party affair, and the nominees of such elections have no standing of any nature or kind in governmental affairs unless and until they are elected by all qualified voters at a general election, at which said election the Plaintiff herein and all others similarly situated have the right to participate and exercise their right of suffrage.

XIII.

In answer to paragraph 14 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that they

were acting as Judge and Associate Judge of Precinct No. 48 of Harris County, Texas, solely by virtue of the laws of Texas, as administrative officers of the State of Texas. Defendants respectfully represent to the Court that they were Democratic Party officials and that they were acting in their capacity of Judge and Associate Judge of Precinct No. 48 of Harris County, Texas, at the times and place related in Plaintiff's First Amended Bill of Complaint upon the instructions of the Democratic Party, as is more fully set out in paragraph No. XXIII herein, and independently of any statute of the State of Texas.

XIV.

Defendants further especially deny so much of paragraph 15 of plaintiff's First Amended Bill of Complaint as relates "defendants were administrative officers of the State of Texas" and "defendants were under a duty to receive the vote of Plaintiff and the votes of all other qualified electors presenting themselves to vote on the dates set for the primary election", because the elections complained of were primary elections and not elections within the intent and meaning of the Fourteenth and Fifteenth and Seventeenth Amendments of the United States, and the Defendants were following the mandatory instructions of the Democratic Party at the same time, all as is more fully set out in paragraph No. XXIII herein.

XV.

Defendants especially deny, in answer to paragraph No. 19 of the Plaintiff's First Amended Bill of Complaint, that they were acting as Judge and Associate Judge of Precinct 48 of Harris County, Texas, solely by virtue of the laws of Texas, as administrative officers of the State of Texas, or that they were under a duty to deliver an official ballot to all qualified electors who presented themselves at the vot-

ing place during the hours that the voting place was open, or that Plaintiff was denied a ballot to said Democratic primary election solely because of his race or color. Defendants respectfully represent to the Court that they were acting in their capacity of Judge and Associate Judge of Precinct No. 48 of Harris County, Texas, at the times and place related in Plaintiff's First Amended Bill of Complaint upon the instructions of the Democratic Party, as is more fully set out in paragraph XXIII herein, and independently of any statute of the State of Texas.

XVI.

In answer to paragraph No. 20 of Plaintiff's First Amended Bill of Complaint, Defendants deny that they conspired with each other and others unknown to deprive the Plaintiff and other qualified Negro electors of the State of Texas, of the right to vote in the Democratic primary election held in Harris County, Texas, on July 27th, 1940, in violation of the United States Constitution and law, but that these Defendants were following the mandatory instructions of the Democratic Party at such times, as is more fully set out in paragraph No. XXIII herein.

XVII.

In answer to paragraph No. 21 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that Defendants, at the times and place set out in Plaintiff's First Amended Bill of Complaint, were acting as administrative officers of the State of Texas, or that the refusal to permit the Plaintiff at the times and place set out in his First Amended Bill of Complaint constitutes a denial or abridgment of the right of the United States citizen to vote within the meaning of Sections 2 and 4 of Article 1, and Amendments Fourteen, Fifteen and Seventeen thereto of the Constitution of the United States en-

acted pursuant thereto. Defendants respectfully represent to the Court that they were not administrative officers of the State of Texas, but, to the contrary, were party officials of the Democratic Party of the State of Texas, at the times and place referred to in Plaintiff's First Amended Bill of Complaint.

XVIII.

In answer to paragraph No. 22 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that there is an actual controversy between the parties hereto, but respectfully aver that the identical matter of this suit has been previously disposed of by this Court in civil action No. 20 and civil action No. 449 and by the Supreme Court of the United States in the case of *Grove v. Townsend*, 295 U. S. 45, in each of which cases the alleged relief sought by the Plaintiff herein has been denied to other Plaintiffs under identical set of facts. Defendants respectfully represent to this Court that the Plaintiff herein has filed this suit, not because he seeks an adjudication of any right to which he might believe himself legitimately entitled, but only to continue a harrassment of the Democratic Party of Texas, its officials, and more especially, the defendants herein.

XIX.

In answer to paragraph No. 23 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the failure of Defendants to permit them to vote at the primary election therein referred to, or to permit Plaintiff to become a member of the Democratic Party, or engage in its activities, deprives them of any right, power or privilege to vote. Defendants respectfully represent to the Court that a primary election, and more specifically, the election referred to in Plaintiff's First Amended Bill of

Complaint, is not an election within the intent and meaning of the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States. Defendants further deny that any such alleged deprivation damaged plaintiff in the sum of \$3,000.00, or any other sum of money, or other thing of value.

XX.

In answer to paragraph 24 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that Plaintiff and those on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future, or that they have no plain, adequate or complete remedy or redress; Defendants allege that the actions as complained of herein are the actions of the Democratic Party of the State of Texas, of which this Plaintiff and those in whose behalf he sues are not members, and that Plaintiff, together with those in whose behalf he sues, are not entitled to a declaration of rights and injunction.

XXI.

Defendants respectfully represent to the Court that the elections referred to in Plaintiff's First Amended Bill of Complaint are Democratic Party primary affairs; that the costs thereof were borne altogether by the Democratic Party in Texas, the funds therefor being secured from the individual members of the Democratic Party who sought the nomination of their party for the respective offices to which they hoped to become elected at a general election held subsequently to the primary election referred to in Plaintiff's First Amended Bill of Complaint, namely, November 5th, 1940, at which said general election the Plaintiff herein and all others similarly situated had the opportunity to exercise their right to vote if he and they elected

to do so, in which latter case the right was guaranteed to him and them under the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States.

XXII.

Defendants further respectfully represent to the Court that any attempt by or on the part of the legislature of the State of Texas to manage or control the party affairs of a political party, and more especially the Democratic Party, is unauthorized and of no effect, for the reason that the Democratic Party of Texas is a group of persons possessing a common political belief, who voluntarily associated or banded themselves together for the purpose of electing one of their number to be voted for or against in a general election, which was held in the City of Houston, Harris County, Texas, on the 5th day of November, A. D. 1940, at which said general election the Plaintiff and all other qualified electors under the laws of the United States and the State of Texas had the right to participate if they elected to do so.

XXIII.

Defendants respectfully represent to the Court that the Democratic Party of Texas is a political party composed of a voluntary association of persons who have common political ideas; that the Democratic Party of Texas in convention assembled at Houston, Texas, on May 4th, 1932, unanimously adopted the following Resolution:

"Be It Resolved, that all white citizens of the State of Texas, who are qualified to vote under the Constitution and laws of the State, shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

Defendants respectfully represent to the Court that Plaintiff, and all others similarly situated cannot comply with those prerequisites and the Democratic Party of the State of Texas has never annulled, abrogated or amended said resolution, and it is, therefore, in full force and effect; that there is only one Democratic Party in the State of Texas; that the Democratic Party of Harris County, Texas, is a part and subdivision of the Democratic Party of the State of Texas, which passed the resolution herein set out, and that the Democratic Party of Harris County, Texas, received its authority to conduct its affairs, including the holding of primary elections referred to in Plaintiff's First Amended Bill of Complaint, from the Democratic Party of the State of Texas; that Defendants herein were bound to refuse to permit the Plaintiff herein the right to participate in the Democratic primary election referred to in Plaintiff's First Amended Bill of Complaint by the mandate of the resolution herein referred to.

XXIV.

Defendants are not seeking to deprive the plaintiff and all others similarly situated from participation in any election within the intent and meaning of the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States; that they are officials of a private organization voluntarily formed for the purpose of expressing political ideas and ideals; that neither they nor the members of the political party could elect anyone to any office by virtue of the primary elections referred to in Plaintiff's First Amended Bill of Complaint in that said primary elections were conducted only for the purpose of nominating persons to the several positions which were voted on by all qualified electors, including Plaintiff and all others similarly situated, at the general election which was held in Houston, Harris County, Texas, on the 5th day of November, 1940, the expense of which said general

election was borne by Harris County, Texas, with public funds, provided all said qualified electors exercise their right to participate in said general election.

Wherefore, premises considered, Defendants pray the Court that Plaintiff be denied all the alleged relief he seeks in his petition; that Defendants have their costs in this suit expended; that they have such other and further relief, in law and in equity, to which they may be justly entitled.

Respectfully submitted,

S. E. ALLWRIGHT,

.....
Defendants.

GLENN A. PERRY,

Attorney for Defendants.

GLENN A. PERRY,

(Glenn A. Perry)

Of Counsel.

Attorney for Plaintiff:

H. S. DAVIS, JR.,

409½ Milam Street,

Houston, Texas.

Attorney for Defendants:

GLENN A. PERRY,

510 State National Bank Building,

Houston, Texas.

Before me, the undersigned authority, on this day personally appeared S. E. Allwright and James J. Liuzza, each of whom being first by me duly sworn, on his oath for himself says that he is one of the Defendants in the foregoing petition; that he has for himself read the foregoing petition

and knows of his own knowledge that the facts therein stated are true and correct.

S. E. ALLWRIGHT,

Sworn to and subscribed before me, the undersigned authority, on this, the day of April, A. D. 1942.

.....
 Notary Public, Harris
 County, Texas.

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STIPULATION OF FACTS.

Filed April 25, 1942.

(Title Omitted.)

For the purpose of the record herein, it is stipulated by and between the parties plaintiff and defendants hereto as follows:

1. That all parties to this action, both plaintiff and defendants are citizens of the United States and of the State of Texas, and are residents and domiciled in said State.

2. Plaintiff is a Negro, a native born citizen of the United States residing in Houston, Harris County, Texas, more than 21 years of age. He has resided more than 5 years in the 48th Precinct of Harris County, Texas. He has a poll tax receipt, issued prior to January 31, 1940, as required by law; Plaintiff is and has been a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification.

Plaintiff is a believer in the tenets of the Democratic Party. Plaintiff has never voted for any other candidate, than those of the Democratic Party, in any General Election at all times material to this case; has been and is ready and willing to take the pledge of persons voting in the Democratic Primary.

3. On July 27, 1940, a Primary was held in Harris County, Texas, and on August 24, 1940, a "run off" Primary for nomination of candidates upon the Democratic ticket for offices of U. S. Senator, Congressman, Governor and other State and Local officers. Prior to this time the defendants were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas.

4. At all times material herein the only State-wide primaries held in Texas have been for Nominees of the Democratic Party.

5. Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions.

6. The Harris County Tax Assessor and Collector prepared a list of qualified voters, including plaintiff, and delivered a copy of this list to the defendants prior to July 27, 1940, without expense to either candidates, the Democratic Party or any officers thereof.

7. That the County Clerk of Harris County, Texas, issues and receives absentee ballots for the Democratic Primaries. That the assistants to the County Clerk for Harris County, Texas, during the period of from 20 days to 3 days prior to July 27, 1940, issued and received absentee ballots for the Democratic Primary. That the said County Clerk for Harris County, Texas, also receives absentee

ballots for General Elections, School District Elections, City of Houston Elections and other District Elections.

8. That on July 27, 1940, plaintiff presented himself to vote, in the said Democratic Primary, at the regular polling-place for the 48th Precinct with his poll tax receipt and requested to be permitted to vote. Defendants refused him a ballot, because of his race and color, in accordance with the instructions of the Democratic Party of Texas.

9. That the County Clerk, the Tax Assessor and Collector, the County Judge of Harris County and the Secretary of the State of Texas all have performed their duties under Articles 3100-3153, Revised Civil Statutes of Texas, in connection with holding of the Primaries on July 27, 1940, and August 24, 1940, in Harris County, without cost to the candidates or the Democratic Party of any official thereof.

10. That Democratic candidates for the office of U. S. Senator and Congressman were nominated at the Primary held on July 27, 1940, and that such nominations were certified by the Secretary of State to the General Election officials as the Democratic nominees and that all of such Democratic candidates were elected to the office of U. S. Senator and Congressman at the November General Election of 1940.

11. That all qualified electors of the Negro race in Texas are similarly situated as the plaintiff in this law-suit, as to State-wide Democratic Primaries.

12. That the Defendants were Presiding Judge and Associate Judge of the Democratic Primaries in Precinct 48, Harris County, Texas, on July 27, 1940, and August 24, 1940, and they acted as such in refusing plaintiff the right to vote in said Primary.

13. After such Primary the names of the candidates receiving the nomination are certified by the County Executive Committee to the State Executive Committee, and the State Executive Committee, in turn, certifies such nominees to the Secretary of State who places the names of such candidates on the General Election Ballot to be voted on in the General Election. Such services are rendered by the Secretary of State, are paid by the State of Texas. Said Secretary of State also certifies other Party candidates as well as Independent candidates for places upon the General Election Ballot, such services as rendered by the Secretary of State are paid by the State of Texas.

14. Generally, the regularly elected Democratic Committeemen of each precinct in Harris County, Texas, are appointed to act as Presiding Judges in the Democratic Primaries. Generally the same individuals are appointed by the Commissioner's Court of Harris County, Texas, to act as Election Judges in the General Elections. The Defendants conducted the Primaries of 1940 in the same general manner as the General Elections, in which Negro Electors are permitted to vote.

THURGOOD MARSHALL,
H. S. DAVIS, JR.,
CARTER WESLEY and
W. J. DURHAM,

Attorneys for Plaintiff.

GLENN A. PERRY,
Attorneys for Defendants.

DEFENDANTS' STIPULATIONS.

Filed April 24, 1942.

(Title Omitted.)

For the purpose of the record herein, it is stipulated by and between the parties Plaintiff and Defendant hereto as follows:

1. That the Democratic Party of the State of Texas is a political party, and that it assembled in convention at Houston, Texas, on May 4, 1932, and unanimously adopted the following resolution:

"Be It Resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

2. That the next above recited resolution has never been amended, abrogated, annulled or avoided by the Democratic Party of the State of Texas, in convention assembled since its adoption on the day named.

3. That the Democratic Primaries held in Harris County, Texas, on July 27, 1940, and August 24, 1940, were for nominations, and the candidates nominated by the Democratic Party thereat became candidates for election to the respective offices for which they sought the nomination at a General Election in Harris County, Texas, on November 5, 1940.

4. That the defendants did not deprive the Plaintiff, or anyone else similarly situated of the right to vote at the General Election in Harris County, Texas, held November 5, 1940.

5. The entire expense of holding and conducting the Primaries in Harris County, Texas, on July 27, 1940, and

August 24, 1940, were borne and paid for by the Harris County Democratic Executive Committee; that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned pro rata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied.

6. That defendant S. E. Allwright was in 1938 elected by the Democrats of Precinct 48 as their party Chairman of such Precinct, and following party custom, was appointed as Presiding Judge to hold the two Primaries for the Democratic Party, hereinbefore mentioned, by the Chairman of the Harris County Democratic Executive Committee. Defendant James J. Liuzza was appointed Associate Judge. They received from such County Chairman instructions with respect to the holding of such Primaries.

7. That defendants received their pay for holding the two Primaries of the Democratic Party through the Harris County Democratic Executive Committee, or its Chairman, from a fund raised by the Executive Committee by an assessment of the candidates at such Primaries.

8. Defendants were paid for holding the General Election on November 5, 1940, by Harris County.

Respectfully submitted by:

GLENN A. PERRY,

Attorneys for Defendants.

W. J. DURHAM,
THURGOOD MARSHALL,
CARTER WESLEY and
H. S. DAVIS, JR.,

Attorneys for Plaintiff.

PL. EX. (1).

Instructions to Holders of Election.

1. Officers and Clerks should reach polls by 6:30 A. M.
2. Polls open at 7 A. M. and close at 7 P. M.
3. All officers and clerks shall take the following Oath:

"I solemnly swear that I will not in any manner request or seek to persuade or induce any voter to vote for or against any candidate or candidates, or for or against any proposition to be voted on; and that I will faithfully perform this day, my duty as an officer of this election and guard, as far as I am able, the purity of the ballot box. So Help Me God."

The oath will be administered by the presiding officer first administering it to all other officers or clerks at the same time; and immediately thereafter the assistant Judge will administer it to the Presiding Judge.

4. Examine supplies and see that officers are acquainted with duties.

5. Inspect the ballot boxes before using, to see that they are clear.

6. See that you have four tally sheets, four poll lists for names of voters, a list of qualified voters of your Precinct, and complete return sheets.

7. Have the presiding officer sign his name across back of ballots.

8. Designate the Judge to receive and number ballots and to deposit same in the ballot box.

9. See that each voter folds his ballot so that the name of the presiding officer can be seen before receiving it.

10. See that name of each voter is on certified list, and mark by his or her name a "V" for voted when vote is cast.

11. Begin counting as early as possible and attempt to keep your count up as closely as possible, in order that returns can be made of the Ballot Box to the Civil Court House with as little delay as possible.

12. At each change of the boxes, one of the Judges shall announce at the outer door of the voting place the number of votes already cast.

13. Do not allow any loafing or loitering within 100 feet of the polls.

14. Keep the ballot boxes within full view of the public.

15. See that ballots are marked with black pencil or ink.

16. At 2 P. M. count absentee votes which have been delivered to you.

17. Do not allow any voters to take into polling place any memorandum or prepared list to aid him in marking ballot.

18. In assisting an illiterate voter, have present two officers of election.

19. And do not tell him for whom to vote; you can tell him the names of the candidates and the office they seek, and let him make his own choice.

20. In case a voter mutilates a ballot, he must return it to officer, before receiving another, and he cannot be allowed to exceed three. You shall keep a list of mutilated ballots.

21. When ballot has once been deposited in the ballot box it cannot be returned to voter and by him corrected or changed.

22. In making returns, fill in blanks showing the total number of votes cast, and see that it tallies with the number of names on the Clerk's poll list.

23. Be careful to see that the number of votes each candidate receives is in plain figures opposite his name on the return sheet.

24. Carefully sign and seal the returns in duplicate at least. Deliver the returns promptly to the Court House on Fannin Street in Houston, Texas, bringing with you, properly prepared, the statement for clerk hire sent with these supplies.

HARRIS COUNTY DEMOCRATIC
EXECUTIVE COMMITTEE,
CHAS. E. KAMP,
Chairman;
GLENN A. PERRY,
Secretary.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
PREPARED AND FILED BY THE TRIAL JUDGE
UNDER RULE 52 OF THE FEDERAL RULES OF
CIVIL PROCEDURE.**

55.

Filed May 11, 1942.

(Title Omitted.)

Thurgood Marshall, of New York City, N. Y.,
W. J. Durham, of Sherman, Texas,
Carter W. Wesley and H. S. Davis, Jr., of Houston, Texas,
For Plaintiff.

Glenn A. Perry, of Houston, Texas,
For Defendants.

Statement of the Case.

This is another of many cases arising in Texas, several in this District, involving the question of the right of negroes to vote in Texas Democratic Primary Elections.

Plaintiff sues Defendants, who are Democratic Primary Election Judges of Precinct 48, Harris County, Texas, for damages for refusing to allow him to vote at such Primaries on July 27, 1940, and August 24, 1940, and also prays, for himself and for other persons similarly situated, for Declaratory Judgment, declaring that they are entitled to vote at the Democratic Primaries in Texas.

The Jurisdiction is under Subdivisions 1, 11, and 14, of Section 41, Title 28, and Sections 31 and 43, Title 8, U. S. C. A.

Findings of Fact.

(a) Plaintiff is a negro, a natural born citizen of the United States, a qualified elector and voter under the Con-

stitution and other Laws of the United States and of the State of Texas, and on July 27, 1940, and August 24, 1940, resided in Voting Precinct 48, Harris County, Texas. He is a Democrat.

(b) On July 27, 1940, and again on August 24, 1940, being a qualified voter as stated, he presented himself before Defendants, Democratic Primary Election Judges of Precinct 48, exhibited his poll tax receipt, and requested that he be permitted to vote and cast his ballot at such Primary Election, which was being held for the nomination of State and County Officers, United States Senator, and Congressman. Defendants refused to allow him to vote, basing their refusal upon a Resolution of the Democratic Party in Texas passed May 4, 1932, to the effect that only white citizens of the State of Texas qualified to vote under the Constitution and Laws of Texas shall be eligible for membership in the Democratic Party and entitled to participate in its deliberations. All white citizens qualified to vote in such Precinct who presented themselves were allowed to vote at such Primary Election, but no negroes were allowed to vote.

(c) There is no proof as to the amount of damages, if any, suffered by Plaintiff by being refused the right to vote.

(d) The facts in detail have been stipulated, but it seems only necessary to refer to the Stipulations and make them a part hereof.

Conclusions of Law.

1. But for a subsequent decision of the Supreme Court (United States v. Classic, 313 U. S. 301, 85 L. Ed. 1368), this case could and would be quickly disposed of by citing Grovey v. Townsend, 295 U. S. 47, 79 L. Ed. 1292. Plain-

tiff, however, contends that because of the decision in the Classic case, *Grovey v. Townsend* is no longer controlling, and it is, therefore, necessary to examine closely the reasoning in both cases.

The facts in *Grovey v. Townsend* were substantially the same as here.

The Classic case was an Indictment against Classic, et al, Election Commissioners under the Law of the State of Louisiana, charging that they wilfully altered and falsely counted and certified ballots of voters cast in a Democratic Primary Election in Louisiana, to nominate a candidate of the Democratic Party for Representative in Congress. The question was whether the right of a voter to cast his vote and have it counted in such election was a right given or secured by the Constitution of the United States, so as to make Classic, et al, guilty of an offense against the Laws of the United States by wilfully altering and falsely counting and certifying the ballot of such voter. The two controlling points in the case, as stated in the Opinion, are as follows (*italics mine*):

"The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not. Where the State law has made the primary *an integral part of the procedure of choice*, or where in fact the *primary effectively controls the choice*, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is *by law made an integral part of the election machinery*, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representa-

tive. Here, even apart from the circumstances that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is *alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative*. Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry v. United States*, 256 U. S. 263-269, 285, 287."

2. Discussing now the first controlling point.

In Louisiana, the State Law has made the Primary "an integral part of the procedure of choice". In Texas, it has not. In the *Classic* case, it is said with respect to the Louisiana State Law (*italics mine*):

"The primary is conducted by the State at public expense. Act No. 46, *supra*, Sec. 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot", etc.

In *Grovey v. Townsend*, it is said (*italics mine*):

"While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nom-

inees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the State, but by members of the party seeking nomination (Arts. 3108; 3116); the ballots are furnished not by the State, but by the agencies of the party (Arts. 3109; 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123; 3124-5; 3127); and the State recognizes the State convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136; 3139)."

There are other essential differences between the Laws of the two States, all of which make it clear that, as stated, while the Law of Louisiana makes the Primary an integral part of the procedure of choice, the Law of Texas does not do so.

3. The other controlling point in the Classic case is the finding that "the choice of candidates at the Democratic primary determines the choice of the elected representative".

The main thing in this Record bearing on the question is this, quoted from the Stipulations:

"Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions."

If this is historically correct, which I doubt, and if I may look outside the Record, then such Stipulation fails to take into account that many times during the period named, there was strong opposition not only to the three Democratic nominees named but to other Democratic nom-

inees, and that the Democratic nominees for President failed to carry Texas in 1928. I do not regard the Stipulation quoted as meaning that the choice of candidates at the Democratic Primary in Texas "determines the choice of the elected representative". In politics "you cannot always sometimes tell which to least expect the most".

However that may be, I am not convinced that the Supreme Court would have based the ruling in the Classic case solely upon the second point, nor am I convinced that the Supreme Court intended to overrule *Grove v. Townsend*. I, therefore, follow *Grove v. Townsend*, and render Judgment for Defendants.

T. M. KENNERLY,
Judge.

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FINAL JUDGMENT.

' Filed May 30, 1942.

In the United States District Court for the Southern District of Texas, Houston Division.

Lonnie E. Smith

vs.

Civil Action No. 645.

S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris County, Texas.

On the 11th day of May, A. D. 1942, came on to be heard before the Court, and at a regular term thereof, the above entitled and numbered cause, wherein plaintiff, Lonnie E. Smith, sought to recover of and against the defendants, S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris County, Texas, \$5,000.00 damages, and for Declaratory Judgment

under Section 400, Title 28, U. S. C. A., declaring and adjudging (as stated in Plaintiff's First Amended Bill of Complaint):

"That the policy, custom or usage of the defendants, and each of them, in denying plaintiff and other qualified Negro electors the right to vote in Democratic Primary Elections in Texas, solely on account of their race or color, is unconstitutional as a violation of Sections 2 and 4, of Article 1, and Amendments Fourteen, Fifteen and Seventeen of the United States Constitution."

And the plaintiff and defendants appeared in person and by their counsel of record and answered ready for trial, whereupon the matters in controversy were submitted to the Court, and the Court having received and heard the bills, answers, stipulations, evidence and argument of counsel, is of the opinion that the law and the facts are with the defendants. It is, therefore,

Ordered, Adjudged and Decreed by the Court that plaintiff, Lonnie E. Smith, take nothing against defendants, S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct, Harris County, Texas, in his suit for damages. It is further

Ordered, Adjudged and Decreed by the Court under the Declaratory Judgment Act of the United States that the practice of the defendants in enforcing and maintaining the policy, custom and usage of which plaintiff and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their right to vote within the meaning of the Fourteenth, Fifteenth or Seventeenth Amendment to the United States Constitution or Sections 2 and 4 of Article 1 of the United States Constitution. It is further

Ordered, Adjudged and Decreed by the Court that all costs herein in this Court expended be, and they are hereby taxed against the plaintiff, Lonnie E. Smith, for which let execution issue.

To all the above judgment of this Court the plaintiff, Lonnie E. Smith, excepted and gave notice of appeal to the United States Circuit Court of Appeals in and for the Fifth Circuit at New Orleans, Louisiana.

Entered this 30th day of May, A. D. 1942, as the judgment of the Court.

(S.) T. M. KENNERLY,
Judge.

Approved as to form and contents:

THURGOOD MARSHALL,
Attorney for Plaintiff.

GLENN A. PERRY,
Attorney for Defendants.

TRANSCRIPT OF TESTIMONY.

Filed June 6, 1942.

In the District Court of the United States for the Southern
District of Texas, Houston Division.

Lonnie E. Smith, Suing on Behalf of Himself and on Behalf
of Other Qualified Negro Voters in the State of Texas,
Plaintiff,

vs. Civil Action No. 645.

W. D. Miller, County Clerk of Harris County, Texas, and
S. E. Allwright, E. George and James J. Liuzza, As-
sociate Election Judges, 48th Precinct of Harris
County, Texas, Defendants.

Appearances:

Thurgood Marshall, Esq., and
W. J. Durham, Esq.,

Appearing for and on Behalf of the Plaintiff.

Glenn A. Perry, Esq.,

Appearing for and on Behalf of the Defendants.

The Court:

Civil Action 645, Lonnie Smith versus W. D. Miller. Is
the plaintiff ready?

Mr. Marshall:

Yes, if Your Honor please.

The Court:

Defendant ready?

Mr. Perry:

Yes, sir. If the Court please, I have amended answers
to the plaintiff's amended petition, which have been

signed by one of the two defendants, and the plaintiff waives further signature. If it please the Court, I would like to present them with one signature.

The Court:

Just file them.

Mr. Perry:

Thank you, sir.

The Court:

Do you want permission to amend, or have you already gotten it?

Mr. Perry:

We both announced at the time that this case was called that we would amend. I don't know whether the Court granted us permission at that time or not. We both have stipulations to sign and file, which I am checking over right this minute.

The Court:

All right. Gentlemen, you are going to trial on the amended pleadings filed today; is that correct?

Mr. Perry:

Amended pleadings filed today and amended answers.

Mr. Marshall:

If Your Honor please, there were some appendices to the original complaint, and in lieu of copying them again we can use those.

The Court:

In other words, your amended pleadings refer to your original pleadings for exhibits?

Mr. Marshall:

Yes, sir.

The Court:

All right.

Mr. Marshall:

And two sets of stipulations.

The Court:

Do you want to have the witnesses sworn, or do you have any witnesses?

Mr. Marshall:

We have one.

The Court:

Let us have them all sworn, both sides.

Mr. Perry:

Judge, the defendant was in my office when I left Judge McCalla's office, but whether he went back to this Court or that Court, I have not been able to ascertain; but he is in the vicinity right close around.

Mr. Marshall:

If Your Honor please, in order to further shorten the trial we have agreed that the depositions taken subject to the approval of the Court, of Mr. Butcher and Mr. Germany, can be used.

The Court:

Not in the previous trial of this case?

Mr. Marshall:

No, sir; of the Hasgett case.

The Court:

That is No. 449?

Mr. Marshall:

Yes, sir.

Mr. Perry:

I want to put Mr. Kamp's testimony also out of the Hasgett case.

The Court:

What are you agreeing to? Tell me again. Out of the Hasgett case?

Mr. Marshall:

The Hasgett case, the depositions of Mr. E. B. Germany and Mr. C. A. Butcher, and the testimony of Mr. Charles E. Kamp, who is now in the army.

The Court:

Then you have stipulations in this case?

Mr. Marshall:

Yes, sir.

The Court:

Two sets of stipulations?

Mr. Marshall:

Two sets, yes, sir; both signed by both sides.

The Court:

And in addition to that you have some oral testimony?

Mr. Marshall:

Yes, sir.

The Court:

Suppose you tell me what the case is about, I don't remember the Hasgett case.

Mr. Marshall:

Yes, sir. According to this case, during the primary election in 1940 the plaintiff is a qualified elector, there is no question as to his qualifications, and that he suffers no disqualifications, and that he applied to the County Clerk's office for an absentee ballot during the regular period preceding the primary election, and he was refused an absentee ballot on the ground of his race or color; and that at the election of July 27, 1940, he applied to his precinct, Precinct 48, and requested of the defendants a ballot and permission to vote in the Democratic primary, and he was refused this ballot on the ground of his race or color.

The complaint bases its jurisdiction on a violation of Article 1 of the U. S. Constitution, involving the election of congressmen, since congressmen were nominated and elected in 1940, and Article 14 of the Amendments to the U. S. Constitution, and Article 15 and Article 17, because a United States senator was likewise nominated and elected during this 1940 election.

The main difference between this case and all of the other primary cases is that in this case we not only alleged a violation of the Fourteenth and Fifteenth Amendments, but we also alleged a violation of Article 1, on the theory of the case of the United States versus Classic, the Louisiana primary case, if Your Honor remembers, decided by the Supreme Court last year.

The Court:

How do you get jurisdiction here; by reason of the claim that involves a question under the Constitution and value of more than \$3,000.00?

Mr. Marshall:

We claim both the question of jurisdiction on the \$3,000.00 point and the main point that we rely on is the

Civil Rights Statute, Sections 41 and 43, Title 8, which give a right of action for a violation of the United States Constitution and the United States laws.

The Court:
Section 41?

Mr. Marshall:
And 43 of Title 8.

The Court:
Of the Code?

Mr. Marshall:
Yes, sir, the Civil Rights Statutes.

The Court:
Also you stand under Section 41 of Title 28?

Mr. Marshall:
Yes, sir, and specifically Subsection 14 under Section 41, which does not require the jurisdiction of amount.

The Court:
In other words, you have three theories of jurisdiction?

Mr. Marshall:
Yes, sir.

The Court:
First under Section 41, the \$3,000.00 statute?

Mr. Marshall:
Yes, sir.

The Court:
And second, under Subdivision 14 of 41?

Mr. Marshall:

Yes, sir. And then there is one other, I think it is 11, which is specifically about voting. Subdivision 11.

The Court:

Of what?

Mr. Marshall:

Of 41. It specifically applies where there is a case involving the question of voting.

The Court:

You think you will get in somewhere?

Mr. Marshall:

That is what we are trying to do.

The Court:

What relief are you asking?

Mr. Marshall:

We are asking for damages in the sum of \$5,000.00.

The Court:

Damages in the sum of \$5,000.00? Is that the only relief?

Mr. Marshall:

And declaratory judgment, sir; declaratory under Section 400, Title 28.

The Court:

Does that about state your picture of the case?

Mr. Marshall:

That is the only difference between this and the others.

The Court:

What do you say in reply to these pleadings, counsel?

Mr. Perry:

If the Court please, our main contention is that this election is not an election that is in violation of the Articles of the Constitution, in that it is a Democratic nomination not an election.

The Court:

I see.

Mr. Perry:

Our defense is that these defendants in this suit are not State officials but are party officials of the Democratic party of Texas, and that the Democratic party of Harris County is a part of the Democratic party of Texas, and that the plaintiff in this case was denied the right to vote by the defendants, or of participating in the primary, because of a mandate of the Democratic party of Texas which was promulgated and handed down to the defendants on May 2, 1932, at a convention of the Democratic party of Texas held in Houston; that the denial or the failure of these defendants to permit these plaintiffs to vote or participate in these primaries constituted no violation of either the Fourteenth, Fifteenth or Seventeenth Amendments to the Constitution, or any of the other laws that have been cited by counsel for the plaintiff.

The Court:

In other words, you are standing about like the defendants stood in the Hasgett case?

Mr. Perry:

Practically the same, yes, sir.

The Court:

You may put on your proof.

Mr. Marshall:
Dr. Smith.

The Court:

I have not read your stipulation, but I take it you are not going to cover anything covered by your stipulation.

Mr. Marshall:

No, sir. There is just one point that was not covered by the stipulation.

Mr. Marshall:

All right, come around.

75 LONNIE E. SMITH was thereupon called as a witness on behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Marshall:

Q. Dr. Smith, you are a qualified practicing dentist in the City of Houston?

A. Yes.

(By the Court):

Q. What are your initials?

A. L. E.

(By Mr. Marshall):

Q. And you are the plaintiff in this case?

A. Yes.

Q. Directing your attention to the time of the Democratic primary election in the year of 1940, did you attempt to secure an absentee ballot to vote in said primary election?

A. Yes.

Mr. Perry:

I would like to make objection at this time, please, to the absentee ballots in primary election, as these defendants are precinct committeemen of Precinct 48 and are not in charge of the absentee balloting or the balloting by absentee votes.

The Court:

Does he make the party who refused him the absentee ballot a party?

Mr. Marshall:

No, sir. What we are trying to do, sir, in our case, we allege that the refusal to give the plaintiff a ballot at the election was pursuant to the general policy, custom and usage in this area, and we want to show that, both in the absentee ballot and in the actual election, the reason, sir, that we cannot make the county clerk a party is because the county clerk is now dead. We just want to give the background of the case.

The Court:

I will take the objection with the case.

(By Mr. Marshall):

Q. Will you explain where you went in an effort to secure the absentee ballot?

A. I went over to the clerk's office, county clerk's office.

Q. Here in Houston, Texas?

A. Down at the Court House in Houston.

Q. In Houston?

A. Yes.

Mr. Perry:

My objection, of course, will go to the entire line of testimony?

The Court:

Yes, sir; that will be all right.

Mr. Perry:

Thank you, sir.

(By Mr. Marshall):

Q. In Harris County?

A. Yes.

Q. And what office did you go to?

A. To the county clerk's office.

Q. And what did you request when you went there?

A. Well, I requested an absentee ballot.

Q. For the primary election?

A. For the primary.

Q. And what happened then?

A. Well, he told me that—

Q. Who told you?

A. The fellow that was giving out the absentee ballots.

Q. Where was this person that you are speaking of?

A. It was in the Court House over there in the clerk's office.

Q. Do you know his name?

A. No, I don't know his name.

Q. Did you present your poll tax receipt?

A. No, he didn't ask for that.

Q. Well, at that time, was this individual giving out other absentee ballots to other people?

A. Yes.

Q. Were those people white people?

A. They were white.

Q. And did he refuse to give you an absentee ballot?

A. Yes.

Q. Did he say why?

A. He said it was a Democratic primary and negroes was not allowed to vote in it.

Q. And he refused to give you an absentee ballot?

A. Yes.

Q. And after that time did you notice that he gave out any more ballots to white people in the office?

A. When we turned around and left and was going out, there was some more behind, white people, and he gave them ballots right on.

Q. Did you hear what was said between this individual and any of the white people who were applying for ballots? Did you hear what they said?

A. They asked for a ballot and he just gave it to them.

Q. Did you hear him ask them what party they belonged to?

A. No.

Q. Did you have your poll tax receipt with you?

A. Yes.

Cross Examination.

By Mr. Perry:

Q. You don't know the gentleman's name that you talked to over there, do you?

A. No.

Q. Did you hear the entire conversation between the clerks and the people who were applying for absentee ballots?

A. They asked for a ballot and he just gave them a ballot.

Q. Were you present during all the conversation?

A. You see, when I go in the office they just asked for a ballot and walked right out behind. I was right behind them.

Q. Do you know what was said to them as they went into the other office or wherever they went?

A. Nothing said.

Q. Nothing said. Was there anybody else in there?

A. There was different clerks.

Q. Did you hear all of the clerks talking to each individual as he went in?

A. I don't understand you.

Q. Did you hear all the conversation between each and every clerk with each and every absentee voter?

A. There wasn't but one clerk that was giving them out, and he was not asking them any questions.

Q. He was not asking any questions. You don't know what his name was?

A. No.

Q. That was in the Court House here?

A. That was in the Court House.

Mr. Perry:

That is all.

(By the Court):

Q. When was that now?

A. That was in July, 1940.

Q. Just before the Democratic primary?

A. Yes, sir.

Q. Were there any other colored men around?

A. There was four of us.

Q. Four of you? Did they go in ahead of you or behind you?

A. We was all along together. I was in the head.

Q. He told you that it was a Democratic primary and he would not give you an absentee ballot?

A. Yes. He said he was not giving it out to colored and if I wanted to know any more about it, to go to some headquarters in some bank building or something.

The Court:

Any other questions?

Mr. Perry:

No, sir.

Mr. Marshall:

No further questions.

The Court:

Stand aside. Call your next witness.

Mr. Perry:

If the Court please, may I have about three minutes to call my office and check up on the defendants, sir?

The Court:

Yes.

(Short recess.)

The Court:

Where will I find these depositions in the Hasgett case?

Mr. Marshall:

We have them here, sir, in the printed record, and they are also in the files here in the Court.

Mr. Perry:

They are in the Clerk of the Court's record, together with also the printed record that went up on appeal.

Mr. Marshall:

We are going to leave these with the stenographer.

The Court:

All right. I can get a copy of it, I guess.

Mr. Marshall:

Yes, sir. They are filed in the Hasgett case.

The Court:

Yes; that is handy to use.

Mr. Perry:

There is one available to the Court, I am sure. If it is not in the files, I have it in my office.

The Court:

Was it filed in the Circuit Court of Appeals?

Mr. Perry:

Yes, sir.

The Court:

What became of the proceedings up there?

Mr. Marshall:

We dismissed them, sir, because in the meantime this Classic case had come up and we wanted to get it under that.

Mr. Durham:

We have one to furnish the Court.

Mr. Perry:

I believe attorneys for the plaintiff intend to file briefs with this Court in connection with this case. Have you filed yours?

Mr. Durham:

No, sir, we have it prepared, but have not filed it.

Mr. Perry:

I will be another two days preparing this.

The Court:

Is this all the evidence?

Mr. Perry:

We have one more witness, I believe. Yes, sir. He is on the way over now.

The Court:

All right. I notice that I based my decision before not on what I thought about the cause, but what the Supreme Court thought about it.

Mr. Perry:

That is correct, in Grove versus Townsend. That case is still the case on this point so far as we understand the law.

The Court:

You think there is something later?

Mr. Marshall:

We think the Classic case settles it now.

82 S. E. ALLWRIGHT was thereupon called as a witness on behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Marshall:

Mr. Marshall:

If Your Honor please, we want to question him as an adverse witness just a moment.

The Court:

All right. What is the name?

A. Allwright.

(By Mr. Marshall):

Q. All what?

A. A-l-l-w-r-i-g-h-t.

The Court:

What are your initials, Mr. Allwright?

A. S. E.

The Court:

Is he the defendant?

Mr. Marshall:

Yes, sir.

(By Mr. Marshall):

Q. You are the defendant in this case?

A. How is that?

Q. You are one of the defendants in this case, and you are the judge of the election in the 48th Precinct?

A. Yes, sir.

Q. And you were such judge during the Democratic primary election in the year of 1940?

A. Well, I have been chairman out there for the last 12 years.

Q. And as chairman you have acted as an election judge of the primary at each one of the primaries during that period? Your answer is yes?

The Court:

Answer out, please.

A. Yes.

(By Mr. Marshall):

Q. Prior to the primary election in 1940 did you receive printed instructions as to the method of holding the election?

A. Yes, sir.

Q. Do you remember those instructions, what they were?

A. Well, no, I don't remember them right offhand, no.

Q. I show you a sheet of paper entitled "Instructions to holders of elections" and ask you if that is the type of sheet you received?

A. I imagine it is, yes.

Q. So far as you know, this is the same type?

A. Yes. I never read it all, see, but I am sure that it is the same type.

Mr. Marshall:

Do you have any objection to its admission?

Mr. Perry:

No.

Mr. Marshall:

If Your Honor please, we tender this as Plaintiff's Exhibit 1.

(The document was received in evidence as Plaintiff's Exhibit 1.)

The Court:

Let me see it.

(The document was handed to the Court.)

The Court:

I don't see anything in here about negroes voting.

Mr. Marshall:

No; that comes separately, I think.

The Court:

All right.

(By Mr. Marshall):

Q. Mr. Allwright, do you, in the conducting of the primary election and the general election, take the same oath for both elections?

A. Well, I am not sure about that.

Q. Did you take the oath on this sheet here?

A. Yes, I taken it on that.

Q. And at the general election, do you take the oath from—

A. The instructions that they send out.

Q. So far as you know, they are the same oaths, in the language of them?

A. Well, I don't know about that, I would have to read them both to find out. I don't pay that particular attention, whether it is the same oath. I would have to have them both to read them to be sure about that.

Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to?

A. No, we never ask them.

Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct?

A. Right.

Q. And negroes are not permitted to vote in the primary election?

A. They don't vote in the primary.

Q. But any white person is that is qualified; regardless of what party they belong to, they can vote?

A. That is right.

Q. And you do let them vote?

A. Yes.

Mr. Marshall:

Your witness.

Cross Examination.

By Mr. Perry:

Q. Mr. Allwright, do you receive any other instructions at the time of the primaries other than the printed instructions that you identified here?

A. No, I don't think we do. I am not certain about that now, but I know that we get this instructions.

Q. And you comply—

A. And that is what we go by, the instructions that we receive.

Q. You go by the instructions that you receive?

A. Yes.

Q. If you receive this instruction, that is the instruction you followed; is that correct?

A. Yes.

Q. Mr. Allwright, who appoints you as presiding judge?

A. Well, the executive committee, don't they?

Q. You mean the Harris County Democratic executive committee?

A. The Harris County Democratic party appoints me.

Q. Who tells you how many clerks you can have?

A. They do.

Q. Who tells you how much money you receive?

A. They do.

Q. Do you abide by those instructions?

A. Yes, sir.

Q. In holding primary elections, Mr. Allwright, I will ask you if the instructions that you receive from the Harris County Democratic executive committee are the instructions by which you abide in the handling of elections?

A. Yes, sir.

Q. Was that true in 1940?

A. Yes, sir.

Mr. Perry:

I believe that is all.

Re-Direct Examination.

By Mr. Marshall:

Q. Mr. Allwright, you did refuse the defendant in this case a ballot at the primary in 1940?

A. You say did I do it?

Q. Yes, sir.

A. Not as I know of. It might have been one of the clerks that done it. I don't know as I done it. I wouldn't say that I did.

(By the Court):

Q. There were not any negroes voted in the primary in 1940 here in Houston, were there?

A. I beg your pardon?

Q. There were no negroes voted in your precinct in the primary in 1940, were there?

A. No, they don't never vote in the primary.

Re-Cross Examination.

By Mr. Perry:

Q. One further question: Did you handle the general elections on November 5, 1940?

A. I have handled them all.

Q. At that time did qualified negro electors vote?

A. In the presidential election?

Q. Yes, general election in November.

A. Yes, sir; they all vote then.

Q. They all vote?

A. Yes.

Q. You didn't restrict this plaintiff or any other negro the right to vote in that election?

A. They all have a right to vote. They all vote.

Mr. Perry:

I believe that is all.

The Court:

Do the records show that this primary in 1940 was for the purpose of nominating congressmen and senators?

Mr. Perry:

Yes, sir.

Mr. Marshall:

Yes, sir, the stipulation.

Mr. Perry:

The stipulation covers United States senator, congressman, governor and other State and local officers, yes, sir.

The Court:

Any other questions?

Mr. Marshall:

No, sir.

The Court:

You may stand aside, please.

Mr. Marshall:

That is all.

The Court:

Do you gentlemen wish to argue it?

Mr. Marshall:

We both rest.

If Your Honor please, we have a pretty exhaustive brief here, and if Your Honor wants to hear us besides the brief, we are perfectly willing to argue it.

The Court:

If you care to present it on briefs, I will be glad to have them. That is a perfectly satisfactory way to present it.

Mr. Marshall:

Your Honor, the case shapes up—just a brief point—it shapes up entirely under the two points, we think: No. 1 is that we have always taken the position that Grovey versus Townsend was in dispute or opposed to the other decisions on primary elections, and the Classic case settles that.

The Court:

You believe that is not sound?

Mr. Marshall:

I hate to go that far, sir, but that is the way we have been driven to, and I think the Classic case points that out very well, because in the Classic case it involved the usual political procedure in Louisiana of changing ballots and throwing out ballots and corrupt political practices in some areas. In this Classic case some white voters in the Democratic primary had their ballots tampered with, and an action was brought under Sections 51 and 52, Title 18, which are the criminal provisions of the same Civil Rights Statute that we are under here, and the Classic case held that the Democratic primary in Louisiana was an integral part of the election machinery, and the refusal to permit this man's vote to be counted was a violation of Sections 51 and 52, and it went further in 52 to hold that it was done under color of State statute, which to our mind throws the Grovey versus Townsend case out. The decision mentioned Nixon versus Condon and Nixon versus Herndon, and does not mention Grovey versus Townsend at all, just ignores it, and goes around, cuts all the ground work out from under it and lets it stay.

The Court:

Is there another decision of the Supreme Court about the same time as the Louisiana case?

Mr. Marshall:

Not on the primary. At least I did not find one.

The Court:

I thought there was.

Mr. Marshall:

No, sir. In the case in Louisiana, according to the opinion, it is based on the statutes, Your Honor, as to whether or not it is State action. We have furnished in our brief as Appendix B a chart or table showing the statutes in Louisiana used in the Classic case and the statutes in Texas used in the Classic case. They are almost identical, with one exception. In Louisiana the candidates are assessed money; they pay their money into the county and State treasury, and then the county and State pay for the primary. That is the difference between Classic and Texas.

The Court:

Do they pay anything more than that to the county and State?

Mr. Marshall:

It is not clear, sir. The difference, so far as we are concerned, is immaterial, because in Texas the candidates pay for the election, with the exception of what is performed by the State, which nobody pays for except the taxpayers. So that the statement that the expenses of the primary are paid by the Democratic party in Texas is not true. The county clerk does certain things, the secretary of State will do certain things, and the other officials do certain acts, and they are not paid for it, and they are incidental to the primary election. But the persons

who pay the actual expenses of the running of the primary; the buying of paper and pencils and stuff like that, and the payment of the clerks' and the judges' salaries for the election, are not paid by the Democratic party; they are paid for by the candidates. In Louisiana they are paid for by the candidates. So there is actually no difference in who puts up the money for the primary between the laws of Louisiana and the laws of Texas. And it is quite clear that the money that is paid in Texas, according to the Supreme Court of Texas, does not belong to the Democratic party; it never belongs to the Democratic party; it is a trust fund, and after the election the balance must be returned to the candidates. That is the Supreme Court of Texas, as cited in the brief. So that actually the party does not pay for the elections; the candidates pay for it, the same way as they do over there in Louisiana. But this case is stronger than the Louisiana case, on several points. In Louisiana it was doubtful as to whether a Democratic candidate could run in the general election, and the Supreme Court said that, although it was doubtful the way they construed the statutes, he could not run. But I point out to you, sir, as we do in the brief, that in Texas a candidate who is defeated is out. So that, as a matter of fact, the only way that our plaintiff and the other negroes can have anything to do with this election is at the primary. The final election is just a form matter. The Democratic nominees have always won, with two minor exceptions back in 1860, when that other party, the No-Nothing party won. And then we all remember about Governor Smith. There are only two exceptions. They are always elected, and the Supreme Court, although the people who argued Grovey versus Townsend, insisted that that was a point that had to be considered, and in Grovey versus Townsend the Court said it did not have to be considered, in the Classic case they said that is the important point to be considered, which I say is another reason for saying Grovey versus Townsend is out.

The other point is that, as we argued in the Hasgett case—we did not have anybody to agree with us outside of Your Honor; the Supreme Court said we were wrong, of course—where you divided it up into two sets instead of one you are still smack up against the Fourteenth and Fifteenth Amendments. The Classic case says that. The election so far as we are concerned and so far as the Classic case is concerned consists of one step, which actually is the primary, because the other part is nothing but a mere formality.

So that, if the Constitution means anything at all, then it takes form and throws it out the window and looks for substance.

The other difference, if Your Honor please, is that in every case, Nixon versus Condon and the Herndon case and Grovey versus Townsend—I have checked the briefs in the Supreme Court Library in every one of those cases, and in every case they have argued the Fourteenth and Fifteenth Amendments, and for some reason the Supreme Court would never go the Fifteenth Amendment; they always sent it off on the Fourteenth Amendment.

The Court:

Didn't they discuss it in the Grovey case?

Mr. Marshall:

They discussed it by saying it did not apply. After arguing it all the way down, they just threw it out. I mean they didn't go into it. But I point out to you, sir, that the Fifteenth Amendment does not say anything about elections. It talks about the right to vote, and it does not say the right to vote where or the right to vote in what. It says the right to vote. Well, there is no question that this Democratic primary consists of votes. There is no question that he went there to vote. So it has always been our position that the Fifteenth Amendment applies to all of those actions involving voting.

And that is the other point that we rely upon as much as we possibly can, is that we are not only standing on the Fourteenth Amendment here, we are standing on the Fifteenth Amendment. And we want to go back to the Herndon case. The point that the Supreme Court has completely ignored is the statement of Mr. Justice Holmes in that case to the effect that the right to vote in the primary was just as valuable as the right to vote in the general election. The Supreme Court decided that in the Herndon case. Mr. Justice Holmes wrote it and the Supreme Court adopted it, and then in the Nixon versus Condon case they weaved away from it, and in Grovey versus Townsend they completely ignored it. We want to go back to that point now, and we think in the Classic case it allows us to go back.

If Your Honor please, when Grovey versus Townsend was up there, there was United States versus Newberry and four or five other cases, all of which were contrary as to whether or not a primary was anything or nothing. It was not clear at all. So when Grovey came up the Supreme Court did not know where to go on the question of primary, because it had never been decided.

Now United States versus Classic comes out, takes the United States versus Newberry case and the other cases, distinguishes them, moves them aside, and sets up in very clear form the one proposition that where the primary election is the integral part of the election machinery of a State, then it is subject to Federal control. That is the yardstick they set down. They use the other points, every one of which we come under.

Now that that case is decided, then we submit that the Grovey case does not apply, unless there is somebody can distinguish the statutes in Louisiana from the statutes in Texas, and they are practically identical, with the exception that the Texas statutes are stronger on certain points as to making the election actually a part of the election machinery.

There is no question about it here. In so far as I read the record in the Classic case, it is a Democratic primary. I mean it is for Democrats. Like up in the other States where we have primaries, in Maryland, for example, you register as a Democrat or a Republican, and if you register as a Democrat you cannot vote in the Republican primary. They don't ask you what you are when you go in there. They look on the books, and you vote in the primary that you have registered for. But I submit that this Democratic primary is not a Democratic primary. It is open to anybody, the same as the November election is, except that it is not open to negroes. It is not a Democratic primary; it is a primary. Republicans can vote in it, Socialists can vote in it, Communists can vote in it. Anybody can vote in it that desires to but a negro. It is therefore actually not a Democratic primary; it is a primary. I submit that that is stronger than the Classic case or any other case that I know of.

There is no difference—and it is stipulated there—there is no difference in the running of the two elections, as to the actual performing of the duties by the election judges, between the primary and the general election, except that negroes can vote in the general election but they cannot vote in the primary. That is the only difference between the two elections. So it cannot be a Democratic primary. It is just a primary.

I submit, if Your Honor please, that the only conclusion we would have to conclude on is that the case of White versus the County Committee, that Your Honor decided, decided before Grovey versus Townsend, set down the law. Grovey versus Townsend would have followed it, but after a few years the Supreme Court caught up with the—and I submit that the decision here in the Classic case is perfect justification for Your Honor ruling the same way that you ruled in the Hasgett case on down to the point where you say "I have not changed my views", and the Supreme Court now gives full authorization for it, and that is why

we went back and came up under the Classic case. That is the only difference.

Mr. Perry:

If the Court please, we will, of course, differ with counsel for plaintiff, in that the Classic case grew out of the criminal end of the statutes, based upon votes that had been cast one way and other destroyed or changed another way. In this case no vote has been cast. He also makes the statement that, if a candidate in the Democratic primaries is defeated, he is out. As far as being a Democratic candidate, he is out, but there is no law to prevent the Secretary of State or the officers who certify his candidacy as an independent candidate on that ticket from doing so. He can still run if his party or if his backing so chooses to run him.

On the general election ticket there happens to be the Democratic, Republican, Independent, and other parties listed.

The Grovey versus Townsend case is practically the same case as this case, except that in that instance the suit was filed against Albert Townsend, who was a State-paid county clerk who refused Grovey the right to vote, and the Supreme Court held even then, in his official capacity as county clerk, by the resolution that has been stipulated to and in evidence, the Democratic party had that right.

Our contention, and our pleadings will support the contention, we hope, that the State laws of the legislature of the State of Texas, regardless of the laws they pass, are not binding upon the Democrats. They have no force and effect upon the Democratic party; that the party rules and the control of the party and the controlling of the primaries which are nominations to election are controlled by the Democratic party in convention, and that the rules of that body have not been changed with reference to the right of who shall participate.

We have never contended that these officers do not do their duty. They have followed the statutes if they so desired. We have no control whatsoever over the county clerk, the County Judge, the Secretary of State, or any of those officers in their State offices. There is no question about that. But their acts in accepting absentee ballots for the Democratic party or for the Houston city elections or for the Houston Independent School District or for any other drainage district that wants to hold an election, the county clerk's office accepts all of those ballots. As a matter of fact, I don't believe he has to if he does not want to.

So, as far as the statutes and laws are concerned, no matter what the statutes of Louisiana might happen to be or what the statutes of Texas might happen to be, the contention of the defendants in this case is that the statutes do not apply to any acts of the Democratic party of Texas. We will, of course, elaborate more fully on that in our brief which we will file today.

We think that this case is entirely within the meaning of the Grove case, and the Classic case can be distinguished.

The Court:

You will have your briefs in, you say, in a few days?

Mr. Perry:

Yes, sir.

The Court:

Do you want time in which to reply?

Mr. Marshall:

If Your Honor please, it depends on the brief. The only question is it will take two days to reach me, but a week outside will be time enough.

The Court:

I will say, briefs in ten days, and you can get yours in in two days.

Mr. Perry:

Yes, sir.

The Court:

And you can get yours in then?

Mr. Marshall:

Yes, sir.

The Court:

Mark the case submitted; briefs in ten days. The clerk will take charge of all these exhibits and this printed record and the brief of counsel.

(At 11:40 o'clock A. M., the hearing was closed.)

100 E. B. GERMANY was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified by deposition as follows:

Direct Examination.

By Mr. Durham:

Q. You at present Chairman of the Democratic committee?

A. Executive committee.

Q. And how long?

A. Since the Beaumont convention, I think that was 1938.

Q. And have you held any other offices in the party before that?

A. No.

Q. How long have you been active in the Democratic party?

A. Since I was able to vote, since I was twenty-one.

Q. Is the party itself incorporated—I mean can you explain just the set-up of the party itself?

A. It is a voluntary association. The Democratic party is just an association of Texas people into an organization and it functions to select its candidates and try to get its policies adopted by the State.

Q. Now, I mean—how do you become a member of the party itself?

A. Just go and vote.

Q. Just by voting for a Democratic candidate?

A. There is no way—as far as I know there is no way to join the party itself; membership is defined by or has been defined by State conventions; I don't remember how long back it has been, but the membership of the party, the best I can tell has been defined.

(At this point examination was recessed temporarily.)

A. Let me answer that over again. I don't know just what I said. I want to get that straight. Let him ask that question over again.

Q. How does an individual go about becoming a member of the Democratic party?

A. Well, I don't know, to be honest with you. So far as I know if they go into the primary and vote—well, there have been rules prescribed for people who are members of the party, but so far as a method of becoming a member of the party, I don't know, if qualified to be members I think they only have to go and vote and attend the conventions.

Q. Do you know any qualifications, as such—first of all, are there any written qualifications any place?

A. Not in my records; I have not seen any.

Q. Is there any general understanding about it?

A. I don't know.

Q. So far as you know?

A. You see, the State Chairman of the Executive Committee, nor the Executive Committee do not function at primary elections, they simply canvass the returns of the elections; the election is held by the County Democratic Executive Committee and under the supervision of the Democratic Committee Chairman. Our function is simply—my Executive Committee acts—serves as an auditing committee to canvass the returns of these people and we do not pass on qualifications to vote, and it never has come around—become my province to check into it.

Q. Of your own personal knowledge do you know of anything, outside of race or color, that would prevent a citizen of Texas, whose name appears on the poll tax lists from becoming a member of the Democratic Party?

A. I don't know that race or color would. I can't even answer that question. I don't know what the qualifications are. I know what you are driving at, of course. I don't have any knowledge of it; I have never attended a convention where that question was passed on, it has never been passed on by the Executive Committee, of which I am a member. I don't know anything about it. From hearsay I could give you a lot of testimony, but I know you don't want that.

Q. Now, since you have been chairman has your committee taken any action to prevent negroes from voting in the primary?

A. No.

Q. Has the convention done so?

A. Not while I was chairman.

Q. Has the question come up at all?

A. Not at all. I want to be careful to tell the truth. I have had inquiries from people in this regard. I have always referred them back to our county chairman when I had any, I just referred them to the county chairman, told him it did not come in our province to pass on that question.

Q. Now, you are familiar with the laws in regard to the action of your committee on the election itself, the primary elections, about canvassing the votes, and so forth?

A. Yes.

Q. Does your committee follow those statutes—I mean as to time and place of the canvassing?

A. As near as we can we do; it is just a matter of uniformity, we follow the general statute that applies to all political parties, there is no statute for the Democratic party no more than the Republican or anything else.

Q. You follow the statutes on places of over 100,000 votes?

A. Yes.

Q. You follow those as nearly as you can?

A. As near as we can; it is impossible to follow the letter all over the State; we cannot on all of them.

Q. In the days when primary elections are to be held, you fix those dates; do you follow the dates set out in the statute?

A. Oh, yes. Yes.

Q. How is that done by your committee?

A. My committee meets and fixes the time for the conventions, that is, the place of the convention, the time is already set; we agree to those times, if it is agreeable, convenient. It is usually convenient.

Q. The date is the fourth Saturday in July?

A. We follow the statute, whatever the statute says on that governing all political parties.

Q. Then after that the particular primary elections are held by the individual county executive committee?

A. Yes.

Q. After that the votes are cast, then they are canvassed by your committee?

A. Yes, the returns are forwarded to the chairman of the State committee (me, in this instance) and a copy is forwarded to the secretary of the committee, and we have an auditing committee that checks those returns.

Q. The proceedings each year, where elections are to be held, primary elections, all your committee does is follow the statutes, there is no variation except minor variations in the following of the statutes, is that correct?

A. I would not say there is any variations, sometimes we have some slight variations that don't amount to anything particularly, but we, as nearly as we can, follow the law as we understand it. We understand there is a general law covering all political parties, we follow that general law in so far as certifying our candidates for the general election, both in primary and in convention. All political parties have to meet the same date, all their conventions the same way. We follow that statute as nearly as we can.

Q. Now, are you familiar at all of your own knowledge, I mean of the—I don't know what word to use—several efforts of negroes to try to vote in the primary over a period of twenty years?

A. No, I am not. I don't think anything like that came up in the county where I lived. I know by correspondence—I have had questions put to me—I always referred them to the county chairman and Attorney General.

Q. Isn't it true in your county one time negroes voted in the primary?

A. I don't know. I was raised in Van Zandt County. I have only been in Dallas twelve years. I think they vote in city elections right now, don't they?

Q. Do they, Roger?

Roger Mason:

Yes.

A. I am not a citizen of Dallas, but I understand they do vote in city elections.

Q. During your time as chairman of the committee have you or any member of your committee under your instructions instructed the several county committees to prevent negroes from voting in the primary?

A. Never have.

Q. You did not direct your attention to the elections held last year, 1940—were any instructions issued they were to bar negroes from the primary?

A. Never did.

Q. Were any instructions issued by the convention itself?

A. At Beaumont?

Q. While you have been chairman?

A. I think not. There were not any at Mineral Wells; I was chairman during the Mineral Wells convention. There were no instructions then.

Q. Can you give us an idea what year it was in Mineral Wells?

A. It was in 1940, it was in September, 1940, I believe.

Q. The convention just prior to that, are you familiar with that?

A. The convention—there were several conventions, you understand. The Waco convention was a few months prior to that when we selected our candidates for the National Convention, that is what we call our National State Convention. We have two State conventions on presidential years, one State convention selects delegates to the National Democratic Convention, this is our province, that convention was held in Waco in 1940, and the question was not in issue there. Then the Mineral Wells convention was held, I think, in September following the National Convention in July, I believe our National Convention was then. So far as I know the question was not brought up at any time since I have been in the county; it may have been, in committee, if it did, I did not hear of it.

Q. Prior to then—

A. (Continuing.) We had our State gubernatorial convention at Beaumont at which I was made State chairman. I was a delegate from Dallas County at that convention if that question was brought up I never did know anything about it. I am sure it was not voted on.

Q. Then from the time, from 1938 up until the present time neither the convention itself nor your committee has issued any orders to the local committees; county committees, to bar negroes from voting?

A. I can't say; the convention did not to my knowledge, it did not. I have no records except the records of the executive committee, it has issued no such orders.

Q. The minutes, what about them?

A. I have not seen the minutes. I have asked Mr. Kennedy for them several times, but I have not gotten them.

Q. You are sure the committee has not?

A. No, the committee has not.

Q. This other point is that of the question of the appointment of the election judges and machinery for running the primary and all, is that left up to the county?

A. The county chairman, the county convention is a political unit itself, and the county convention elects its own officers, the county chairman and the various precinct chairmen and all are elected there, and they function as the election organization. Does that answer your question?

Q. The question of the relationship of the executive committee to the convention itself, I mean what is the relationship?

A. Well, the convention sometimes away back in the past fixed some kind of a policy, I imagine, so far as I know it is just tradition handed down to the executive committee, the duties of making the arrangements for the convention, auditing the returns, and so forth, and making a report to the convention for its confirmation, it is just that; subsequently as I understand, the State executive committee has no authority to make any policies or determine any program for the convention but they set up the machinery, preliminary machinery by which the convention goes to work each time. If you want a little more detail, the executive committee arranges the place for the meeting, the State committee sets up a program for the temporary officers, which are usually confirmed from then

on the temporary officers put the convention in operation, then the convention is out of the hands of the State executive committee.

Q. Then after the convention is over the actual management of the party reverts back to the committee, doesn't it, between conventions?

A. Well, in so far as carrying out the program and policy of the convention, I would say yes. They can't fix any policies; they carry out the policies adopted by the convention.

Q. There are no permanent offices of the Democratic party with the exception of those committee members?

A. No, and they serve from one convention to the next, one gubernatorial convention to the next.

Q. Is there any carrying over policy or program from convention to convention? What does each convention adopt, its own policy platform and rules, and so forth?

A. Now I don't know whether I know how to answer that question or not because I have never been at one convention that held over; I have only been to two conventions as an official or as a member. I have never been a delegate except to two State gubernatorial conventions, the Presidential Convention came in between. So far as I know unless there is a resolution passed which changes the general situation, as a matter of precedent only, the conventions assume that whatever has been done in the past goes on and on until it is changed. Now if there is just a matter of precedent, I don't know whether there is a rule or regulation that would fix that policy—I am not trying to dodge the issue—that is the best I can come to it.

Q. Who has the records of the convention?

A. The State secretary has them.

Q. The secretary has them?

A. Mr. Butcher keeps the records of the State executive committee and as far as I know—I don't know who keeps the records of the convention unless he does; I guess he is ex-officio secretary of the convention, at least he

was the last one. At Waco Mr. Van Kennedy was the secretary of the convention, that is the National State Convention when they elected State delegates. Mr. Van Kennedy was secretary of that convention. It does not necessarily follow that the State secretary of the executive committee is secretary of the convention. Many times he is not. That is the case there.

Q. Mr. Germany, I believe you stated that the policy of the Democratic party was adopted at a convention by its members at a gubernatorial convention?

A. Yes.

Q. Unless there was some rule or regulations, some resolution adopted at a prior convention that set a new precedent, the policy is continued?

A. Just as a matter of precedent, I think that is the case. I don't think there has been any regulation so far as I know, I don't have any records to go by, I have no way to speak from the records, just from my observation of the way things are carried on, that is pretty generally carried, the truth of it is it is a loose jointed organization. If anybody can tell what to do they are beyond me, I don't know.

Q. Here is what I was getting at: When you became chairman did the Democratic party in convention continue the policies that had been in effect or adopt a new policy in reference to the policy of the Democratic convention?

A. I don't know. That was my first convention. I don't know what they did was new or old or what. Just from my impression of things I presume they went along in the usual slipshod way of handling things. That is not very complimentary of the Democratic party; that is the way it takes place, whoever wants to get up to make a resolution if he can say anything before anybody else it usually gets by. It is pretty hard to say there is any fixed policy, it is a policy that the convention does whatever the people there want to do at that time. There is no rule

to keep them from doing it some other way if they want to. That is the best I can say. That is the way it has been when I was there; what they expected to happen usually did not happen.

Q. But the orderly procedure of the primary election is regulated by statute, it is followed section by section, that keeps it in a general channel, doesn't it?

A. Well, I will tell you, as a Democrat I don't think the legislature has got a darn thing to do with the Democratic party. As a matter of convenience we follow the statute in reference to these things. I don't think the legislature could have anything to do with it. If we did not do it, there is not a thing they could do about it; just like I am a Methodist, if the Methodists decide to hold our quarterly conference in Fort Worth and it is not in our district, it is not anybody's business if we decide to hold it there. I feel the same thing about the Democratic party. It is an organization that has to follow the statute except in reference to fraud, if we violate the fraud statute and there is corruption I think they could be prosecuted like my boys could perpetrate a fraud on me in the business, otherwise I don't think the legislature has anything to do with it.

Q. You do follow it?

A. As a matter of convenience it is followed. I think we would have considerable argument if we tried to change it to some other date because it is a matter of convenience. If people have a definite time fixed for a certain thing to happen it is a lot easier to celebrate the Fourth of July on the Fourth; in fact, Thanksgiving comes all right on the new date, then it is a matter of convenience, it is Thanksgiving any time you happen to have it; Christmas follows the birth of Christ, naturally there would be some kick about changing it, but if I want to celebrate Christmas like these people in Little America in July, it would be all right.

Q. What about the way the candidates are put on the ballot and types of the ballot used—how are they put on there—to make certain the election is carried out?

A. That is made to prevent fraud in elections. We don't have to follow those forms at all. There is one thing we do have to do under the statutes, it is a thing the Republican party and all others have to do, we have to present to the election officials properly accredited candidates to get them on the ballot. In order to do that it is better to have a uniform system in the primary; we follow a uniform system. I think we have changed the forms we make out several times. There is no cut and dried form we send out. My committee makes up those forms and sends them out. We have a different one—a different primary form from that used two years ago.

Q. Mr. Germany, you say the Democratic party is required to present—to certify candidates under the primary election law?

A. To certain other general election officials.

Q. That certificate certifies them, shows they have been elected according to primary election laws and in accordance with the laws of Texas?

A. In accordance with the laws of Texas.

Q. I believe you said that was a necessity or prerequisite to get them on the general election ballot?

A. It is necessary that they be certified in time the general election is fixed a certain date, it must be prior to that time in order that the general election officials will have time to print the ballot, get it out, that is the first essential; the second essential is that the general election officials must have the names—must be presented names in accordance with the statutes. We have to give a man's correct name if we know what it is that was nominated so that the man nominated will appear on the general election ballot, though it is only a matter of meeting the requirements of the general election law, beyond that I don't think the legislature has anything to do with holding our primary.

Q. So far as you know they always follow it?

A. They follow them pretty closely—they don't exactly, in fact, they could not, the average election official does not know enough for all of them to follow the same procedure,

The Court:

Were there some crosses of Mr. Germany?

Mr. Durham:

No, sir, no crosses. No cross examination of either witness.

We desire at this time to offer the deposition of Mr. C. A. Butcher.

115 C. A. BUTCHER was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified by deposition as follows:

Direct Examination.

By Mr. Durham:

Q. What are your initials, Mr. Butcher?

A. C. A.

Q. You live in Travis County?

A. Yes.

Q. How long, Mr. Butcher, have you resided in Travis County?

A. About—a little over two years.

Q. A little over two years?

A. That's right.

Q. Are you now connected with what is known as the Democratic party of Texas?

A. No.

Q. You do not hold any official capacity in it?

A. I have no official capacity—don't know what you call official capacity. I am called the secretary, but I have no power whatever.

Q. No power?

A. No vote, and I do not even voice the opinions of the members of the committee.

Q. You are serving now as secretary?

A. That's right.

Q. How long have you served in that capacity?

A. Well, I served the last administration and this one.

Q. For about three or three and a half years?

A. Approximately.

Q. Approximately three and a half years?

A. Yes.

Q. What are your duties as secretary?

A. I take notes of meetings and prepare minutes.

Q. You take notes. Do you keep a record of the minutes?

A. I keep a record of the minutes of the convention.

Q. You keep a record of the business of the convention?

A. Yes.

Q. Do you keep a record, or did you keep a record of the business of the last convention; that is, the gubernatorial convention held in September?

A. Yes.

Q. Then I believe you kept a record of the gubernatorial convention that was held two years prior to last September?

A. Which was that?

Q. In Beaumont.

A. I am sorry to say I do not have all those minutes; I have never been able to get them. That is the meeting of the executive committee.

Q. You just have the minutes of the executive committee?

A. I have just our administration.

Q. Your administration only?

A. Yes.

Q. Are there any permanent records that you know of of the Democratic party in Texas?

A. No, not that I know of.

Q. You did not take any of the minutes of that meeting?

A. No, not of that meeting.

Q. Or any of the previous meetings?

A. No.

Q. You say it is your duty to keep a record of the meetings and certify the names of the candidates or nominees to the Secretary of State, after they have been canvassed?

A. That's right.

Q. And each year since you have been serving as secretary, the Democratic party in Texas has held a primary election?

A. No, we have had only one primary since I have been secretary.

Q. That was in 1940?

A. Yes.

Q. Last year?

A. That is right.

Q. They held a primary election July 27, 1940?

A. That is right.

Q. And the run-off on August 24, 1940?

A. That is right.

Q. And those elections were held under the statutes, according to the statutes governing the primary elections in Texas?

A. That is right.

Q. And so far as you know the Democratic party has been conducting the primary elections in accordance with the primary laws and the general election laws of Texas?

A. Well, so far as I know, of course. To the best of my ability I tried to set them up that way.

Q. That was the practice of the party, to hold the elections under the statutes and in accordance with the statutes?

A. That is right.

Q. And that has been the general practice, Mr. Butcher, so far as you have been able to ascertain from the records, what few records you have?

A. So far as I know. Just like I told you, I don't know anything about what they did before, because I have not been active in that at all.

Q. Now, how is the business of the Democratic party operated with reference to leading up to the elections and holding the elections—that is, what procedure do you go through?

A. Well, how do you mean?

Q. To make myself clear—with reference to holding the primary elections, what procedure do you go through in order to hold that election? What does the officers of the Democratic party do, if anything, in connection with the preparation for holding the elections?

A. The candidates for office have to file with the committee.

Q. Then what, if anything, does the officials of the convention or the party do?

A. The officials of the convention, after the election?

Q. No, what do they do with reference to that application—the candidates, as I understand, file an application to become a candidate?

A. That is right.

Q. And that is filed with the secretary of the executive committee?

A. The chairman.

Q. The chairman; then what, if anything, does the members of the committee do?

A. The members of the committee at their meeting have prepared the ballots; the way the names are put—well, they don't do that, either. They prepare the ballot to a certain extent but the way the State is set up, I believe the counties have the right to arrange the names in each county, but we do certify these names to each county chairman in the State.

Q. And then they are placed on the ballot by the county executive committee?

A. That is right.

Q. And the order in which they draw the names?

A. That is right.

Q. After the election those who are nominated then are certified back to the secretary of the executive committee; is that right?

A. No, the results are reported back to the committee and we make a tabulation of the result, you see.

Q. And then those that receive the majority of the votes are certified to the election officials for their names to appear on the general ballots; is that right?

A. That is right.

Q. And the names of the candidates who are nominated in that election are certified to the Secretary of State; is that right?

A. That is right.

Q. Have you any set rules for running the affairs of the convention, Mr. Butcher?

A. Well, to a certain extent.

Q. To a certain extent?

A. Yes. The statutes set up certain regulations pertaining to the convention, that is, as to dates and so on, you know; the manner in which the location is selected for holding the convention.

Q. I believe you say you have no rules, save and except the laws of the State of Texas for governing the convention of the party?

A. No, the party is ruled, outside of the statutes, by the action of the party.

Q. You have no fixed rules?

A. No.

Q. The only rules and regulations that you have fixed for the government of the affairs of the party, is simply the laws of the State of Texas—the election laws of the State of Texas?

A. That is right.

Q. Now, at either of the conventions that you attended, Mr. Butcher, and especially the convention that was held in May, 1940, was there any action taken by the convention to bar negroes from participating in the primary election?

A. I never heard it mentioned at any convention I have attended.

Q. Not that you have attended?

A. Not that I have any recollection of, and I know there was no action taken.

Q. I think that is all, Mr. Butcher; thank you.

122 CHARLES E. KAMP was thereupon called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination.

The Witness:

Your Honor, I want to prove up a lost instrument and I want to lay the predicate for the introduction of verbal testimony in lieu of presenting the instrument itself.

My name is Charles E. Kamp. I am a practicing attorney at the Bar of Harris County, Texas. I am at present chairman of the Harris County Democratic executive committee. I was first elected to that position by the members of the Democratic party at a county-wide election in 1938 and I was re-elected to that position in the same manner in the Democratic primary election of July, 1940. Previous to that I served as secretary of the Harris County Democratic executive committee for a period of four years, ending with the last day of December, 1932, being appointed to that position by the then chairman, Mr. John B. Lubbock. During that period of four years that I served

as secretary of the executive committee of Harris County. I was a practicing attorney at the Bar of Harris County, Texas, and defended some three or four or five of these suits brought by negroes in which they attempted to participate in Democratic primary affairs.

Because of the holding of the Supreme Court of the United States in the latter part of 1931 or the forepart of 1932, as I recall it, in a case styled Nixon versus Herndon with respect to the action of the State Democratic executive committee in promulgating a rule excluding the negroes from participation in Democratic primary elections, I made a recommendation to the Democratic party of Texas in convention assembled at Houston, Texas, on May 24, 1932, being a State convention, that a resolution be passed which might meet the test handed down by Mr. Justice Cardozo in that case. This State Democratic Convention met at the City Auditorium in Houston, Texas, being State-wide, and I was a member of the resolutions committee and I recommended the passage of a resolution, which was passed. The resolutions committee brought that resolution to the floor and moved its adoption. It was duly seconded. The motion was duly seconded. The question was put by the chairman of that convention and that motion was unanimously passed and adopted by that convention. I know the contents of that resolution because I helped frame it. After that resolution had been unanimously passed by that convention, I took that resolution because I had been acting as attorney in these cases and we of the convention believed that the negroes would file another suit testing that mandate of the people of Texas and take it to the Supreme Court of the United States to determine if it met the test. I took that resolution and took it to my office.

Following that, one more case of this nature was filed in Harris County, being styled Grovey versus Townsend, originating in the Justice of the Peace Court for Harris County, Texas, Precinct No. 1, being a suit for \$10.00 in

damages. A demurrer was sustained in that Court and an appeal was taken direct to the Supreme Court of the United States and the Supreme Court of the United States then passed on the question. The Supreme Court of the United States in its opinion reported in 295 U. S. 45, styled *Grove versus Townsend*, quotes that resolution in full.

I have looked for that resolution and I am unable to find it. The place where it would most likely be kept is in my files; more especially in one of the files in connection with one of these suits in which I have appeared in Court as counsel, and I am unable to find it and I don't know its whereabouts. I have discussed its loss with the secretary of the State Democratic executive committee, Mr. Butcher, in Austin, whose deposition was introduced this morning, and Mr. Butcher says he is unable to find it and knows nothing about it.

On January 1 of 1933 I left the private practice of law and became an assistant district attorney in this county, where I remained for five and a half years. The next case of this nature that arose following the adoption of that resolution was then handled by Mr. Nipp, an attorney in Houston, and I talked to Mr. Nipp about this resolution and Mr. Nipp doesn't have the original resolution and knows nothing about the original. I am unable to find it. I do know its contents. I helped frame it and I have lost it, and I would now like to introduce the contents of that resolution by parol.

Mr. Marshall:

If Your Honor please, at this point we wish to make an objection to the introduction of any parol testimony as to any purported resolution. First of all, I would like to go into the facts as so carefully set out by Mr. Kamp. In the first place, it seems to me that in any ordinary type of procedure for an organization, a resolution as passed would be some place in the records of the organization itself. I think that either the chairman of the executive committee

or the chairman of the convention or the secretary of the convention back there should have been questioned as to where that resolution is. I think there should be some connection. The only effort he has made to find the resolution within the State Democratic committee is in connection with Mr. Butcher, who has only been secretary for about two years.

The Court:

He tells though, counsel, that he took it away from the convention itself and brought it back to his office.

Mr. Marshall:

If Your Honor please, the taking away of a paper like that, it seems to me, is strictly out of the ordinary; a paper of that type; and there must be a copy of that paper. Otherwise, I don't see how this particular resolution, that is out in the air, carried away by Mr. Kamp, has any control over the party itself, and as I understand it, this is a resolution of the body that control the party.

The Court:

What position does Mr. Butcher now hold?

A. Your Honor, he is secretary of the State executive committee.

I should like to make an explanation to you in answer to counsel's statement about the records that are kept.

The Court:

Yes, sir.

A. I have attended many Democratic conventions, State and county, and so far as I know I have never seen a set of minutes kept by anyone in those conventions. I don't know who the secretary of that particular convention was. I don't know who the temporary chairman was, nor do I know who the permanent chairman was. They are

elected on the floor at that time. Mr. Butcher would have no reason to have this resolution; nor would Mr. Germany, because the State executive committee has no right, so far as I know, to a copy of those proceedings.

The Court:

Well, you do testify that the resolution as drawn by you was passed by the convention?

A. Unanimously passed without a dissenting vote.

The Court:

And then you took the resolution away?

A. I did, sir.

The Court:

And you propose to offer parol evidence to show what it was?

A. Yes, sir.

The Court:

I think you may do so. Objection overruled.

Mr. Marshall:

Exception.

The Witness:

May I dictate it to the Reporter?

The Court:

Yes, sir. What are you reading from?

A. I am reading from a paper of my own. It was drawn up first in the form of a stipulation. I had hoped we could stipulate, but we couldn't, and I have to refer to this, if it please the Court. I have also checked this back against the quoted resolution in the case of Grovey versus Townsend that I have just mentioned and I know that it is verbatim.

Mr. Marshall:

If it please the Court, I hate to continue to raise objections, but under a recent decision of the U. S. Supreme Court it is impossible to use the facts that have been decided in one case to decide an issue in another case, even though the facts revolve around the same instrument. Now we certainly object to any reading of any purported statement or any purported resolution when the only fact we have here is that Mr. Kamp is positive that he remembers exactly what it is, and then he comes back and he has read from some paper that we know absolutely nothing about.

The Court:

Objection overruled.

A. "Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations."

That is the end of the resolution.

Now I would like to give this further testimony: That since the adoption of this resolution by the Democratic party in convention assembled on May 24, 1932, that resolution has never by any State Democratic convention in Texas been amended, abrogated, annuled, or avoided.

The Court:

You testify to that from personal knowledge?

A. I do, sir, yes, sir. I have kept in constant touch with Democratic affairs and conventions in Texas.

Mr. Marshall:

Are you through?

The Witness:

Not yet.

Mr. Marshall:

Oh. Excuse me.

A. I should like to state that the Democratic primary elections held in Harris County, Texas, on July 27, 1940, and August 24, 1940, were nominating elections and the candidates nominated by the Democratic party thereat became candidates for election to the respective offices for which they sought the nomination at a general election held in Harris County, Texas, on November 5, 1940. At the general election on November 5, 1940, neither the plaintiff in this case nor any other colored person or negro was denied the right to vote.

The Democratic party of Texas is a political party and the Harris County Democratic party is a subdivision of that State-wide political party. Neither the County Judge nor the Commissioners Court of Harris County, Texas, exercised any supervision over the Democratic primary elections of July and August of 1940, or any other primary elections that I know anything about. The instructions that the presiding judges, assistant judges, clerks and supervisors receive come either from me as chairman of the Harris County Democratic executive committee or the regulations are promulgated by the executive committee itself at a meeting it holds of its membership approximately a month before the first primary election of every even year. By "even year" I mean in 1938, 1940, and so forth.

That is all.

The Court:

You may cross examine.

Cross Examination.

By Mr. Marshall:

Q. Have you attended every convention of the Democratic party?

A. Every one but the last one.

Q. When was the last one held?

A. In 1940 in Mineral Wells.

Q. What month?

A. May. It is always in May.

Q. You didn't attend the one in May?

A. I did not.

Q. Well then, as a matter of fact, you can't testify of your own personal knowledge that no action at all has been taken on that 1932 resolution since that time, can you?

A. I wasn't there, but I keep up with those affairs and I know it wasn't.

Q. But of your own personal knowledge, since you were not there, you do not know what action, if any, might have been taken on that resolution?

A. I wasn't on the convention floor nor in the convention city.

The Court:

What did Mr. Butcher and Mr. Germany say about that in their depositions? They just testified that there had been no resolution passed, didn't they?

Mr. Marshall:

During their time and that they had no records and that they weren't quite sure what had happened.

The Court:

Well, they testified that in so far as they knew no resolution of any kind had been passed.

Mr. Marshall:

Had ever been passed.

The Court:

Either rescinding the 1932 resolution or adopting a new one.

Mr. Marshall:

The only question we asked was whether or not while they were in office any action had been taken by the Democratic party to bar negroes from voting in the primaries.

The Court:

And they answered in the negative?

Mr. Marshall:

Yes, sir.

The Court:

That would mean, wouldn't it, that this 1932 resolution was not disturbed?

Mr. Marshall:

I don't know, sir, because in their deposition they say they have no minutes and they are not sure. Mr. Germany says, and I would like to read his language, that he was quite sure what had happened.

The Court:

Well, you stated it this morning. Go ahead.

(By Mr. Marshall):

Q. In connection with the other conventions you have attended since 1932, have you been on the floor of the convention during the entire time the convention was in session?

A. Been on the floor of the convention when all of its business was being acted on.

Q. During each convention?

A. During each convention, that is right.

Q. Now do you have any records at all in your office showing any action taken by any of the conventions you have attended?

A. Actions concerning what?

Q. Anything.

A. I would have no reason to, no.

Q. Now, this purported resolution that was passed in 1932, have you made any effort to find a copy of it?

A. I have gone through my papers. When you speak of a copy of it, my answer is no. I simply find a continued series of this resolution that I have read into the record among the papers in cases that I have handled.

Q. I mean have you made any effort to find a copy of it in anyone else's possession?

A. There was no copy of that resolution. That resolution was drawn up with some other resolutions and presented to the floor of the convention and passed.

Q. And passed and you just carried it away with you?

A. That is right.

Q. I think you testified before that you didn't know who was secretary of that convention and who was the permanent chairman?

A. I do not.

Q. The 1932 convention?

A. I do not.

Q. Have you made any effort to find out?

A. I don't know where to go. I don't know what source to go to to find out. I couldn't tell you who the chairman of these conventions has been. They are nominated and elected from the floor. They serve and then the convention is dissolved and that is all there is to it.

Q. Well then, when the convention dies, the duties of the permanent officers all die with the convention?

A. That is correct. Die, right there.

Q. Well now, speaking of the State Democratic party in Texas, at the present time between two conventions what is the Democratic party in Texas now?

A. The Democratic party between two conventions is composed of a group of individuals who have particular or peculiar political ideals and beliefs.

Q. Just scattered around in the State?

A. Oh, no. They are very well organized.

Q. Well, how are they organized? You said the officers all die with the convention.

A. I don't understand. Would you mind connecting those two questions?

Q. I am speaking of the State party itself.

A. All right. Ask your question.

Q. Now the State party itself, as I understand, when the convention stops, all of the State officers of the convention stops?

A. That is right.

Q. Now is there any other group of officers, with the exception of the State executive committee, existing in the Democratic party in Texas at the present time?

A. There is not.

Q. What is there of the State Democratic party between conventions with the exception of the State executive committee?

A. I am sorry. I don't understand your question.

Q. There is no chairman, is there?

A. There is a State Democratic chairman.

Q. He is the chairman of the executive committee, is he not?

A. That is right. He is chairman of the State executive committee.

Q. But there is no chairman of the party itself?

A. That is right. The moment that convention closes or adjourns the officers of that convention cease to function. They have nothing to do.

The Court:

Might not the chairman of the executive committee be the chairman of the party? Not of the convention, but of the party?

A. Judge, it would be hard for me to answer that. I don't know. If he would be chairman of the party, then I

would probably be chairman of the party in Harris County, but I have never considered myself as such. I have considered myself an administrative party official, of the business and of it, but not of the party itself. I have never considered myself as such. I have always considered that I had a particular job to do, but I do not consider myself as head of the Democratic party in Harris County.

The Court:

Well, the party, after the convention adjourns, and the party's general managers roll up a pretty good majority at the November elections, do they not?

A. Yes, sir, they do right well.

Mr. Marshall:

If you will give me just a moment, Your Honor, I can find in here where Mr. Germany explains what his duties are between conventions, and he denies that he is chairman of the party. He insists he is chairman of the executive committee with practically no power at all.

The Court:

Well, if it is in there, it is already in evidence.

Mr. Marshall:

Do you want me to read it, sir?

The Court:

No, sir. I was just asking out of curiosity. I don't know much about it.

(By Mr. Marshall):

Q. Now carrying the point further, when the one convention dies and the other convention becomes organized, does it not set up its own rules and regulations?

A. Each convention sets up its own rules and regulations.

Q. And is it not completely independent of any prior conventions?

A. In what respect?

Q. Well, is there anything that prevents it from doing what it might want to do? Are there any set rules and regulations in writing any place to control it?

A. In respect to what?

Q. In respect to the transaction of business. Let's start back at the beginning. There are no set rules and regulations in writing governing the convention?

A. That is correct.

Q. There is no constitution?

A. That is correct.

Q. No by-laws?

A. That is right.

Q. When one convention is assembled, is there anything in any prior convention that is absolutely binding on the existing convention?

A. Oh, yes, I think so.

Q. Is there anything that any prior convention has done that the existing convention can't rescind?

A. Oh, I think it could rescind it if it wanted to, but until it is rescinded, I think the act of the prior convention is a continuing act and is in effect.

Q. But there is nothing to prevent this existing convention from taking any action it sees fit?

A. Oh, no.

The Court:

In other words, the convention in 1934 could have rescinded this resolution of 1932 had it seen fit to do so? Is that what you are telling us?

A. Yes, sir.

The Court:

And you think until it is so rescinded, either in 1934, 1936 or 1940, that it is still the law of the Democratic party in Texas?

A. That is right, sir.

(By Mr. Marshall):

Q. Are there any other qualifications set out by the Democratic party for voting in the primary elections that you know of?

A. That is the only one that I know anything about.

Mr. Marshall:

I think that is all.

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APPEAL BOND.

Filed June 6, 1942.

(Title Omitted.)

Whereas, on May 30, 1942, the defendants S. E. Allwright and James J. Liuzza, received a judgment in the above entitled cause, from which judgment plaintiff, Lonnie E. Smith, desires to take an appeal to the Circuit Court of Appeals for the Fifth Circuit:

Now, Therefore, Know All Men By These Presents: That we, Lonnie, E. Smith, as principal, and A. A. Lucas and Julius White, as sureties, acknowledge ourselves bound and obligated in the sum of Two Hundred and Fifty (\$250.00) Dollars; conditioned that the said Lonnie E. Smith will pay all costs in said cause if his appeal to the United States Circuit Court of Appeals for the Fifth Circuit is dismissed or said judgment is affirmed by said Court or said costs as the Appellate Court may award if the judgment is modified.

Witness the execution hereof this 6th day of June, 1942.

LONNIE E. SMITH,

(Lonnie E. Smith)

Principal.

A. A. LUCAS,

(A. A. Lucas)

JULIUS WHITE,

(Julius White)

Sureties.

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NOTICE OF APPEAL.

Filed June 6, 1942.

In the District Court of the United States for the Southern
District of Texas, Houston Division.

Lonnie E. Smith, Plaintiff,

vs.

Civil Docket No. 645.

S. E. Allwright and James J. Liuzza, Election Judge and
Associate Election Judge, 48th Precinct of Harris
County, Texas, Defendants.

Notice is hereby given that Lonnie E. Smith, plaintiff
in the above cause, appeals to the Circuit Court of Appeals
of the Fifth Circuit from the final judgment entered in
this action on May 30, 1942.

Dated this 5th day of June, 1942.

THURGOOD MARSHALL,
(Thurgood Marshall)W. J. DURHAM,
(W. J. Durham)H. S. DAVIS, JR.,
(H. S. Davis, Jr.)Attorneys for Plaintiff-
Appellant.409½ Milam Street,
Houston, Texas.

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CLERK'S CERTIFICATE.

United States of America,
Southern District of Texas.

I, HAL V. WATTS, Clerk of the District Court of the United States, for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and all proceedings had in the case, as called for in the Designation for contents of record on Pages 1 and 2 of this Transcript, in Cause No. 645 on the Civil Action Docket of said Court at Houston, entitled Lonnie E. Smith, Suing on Behalf of Himself and on Behalf of Other Qualified Negro Voters in the State of Texas, versus W. D. Miller, County Clerk of Harris County, Texas, and S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris Court, Texas, as the same now appears on file and of record in my office.

To Certify Which, Witness my hand and the Seal of said Court at Houston, in said District, this the 7th day of July, A. D. 1942.

(Seal)

HAL V. WATTS,
Clerk, United States District
Court, Southern District of
Texas,
By S. F. CUNNINGHAM,
Deputy.



[fol. 150] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 10, 1942

No. 10382

LONNIE E. SMITH,

versus

S. E. ALLWRIGHT, ELECTION JUDGE, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas

On this day this cause was called, and after argument by Thurgood Marshall, Esq., for appellant, and Glenn A. Perry, Esq., for appellees, was submitted to the Court.

[fol. 151] **OPINION OF THE COURT—Filed November 30, 1942**

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10382

LONNIE E. SMITH, Appellant,

versus

S. E. ALLWRIGHT, ELECTION JUDGE, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas, Appellees

Appeal from the District Court of the United States for the Southern District of Texas

November 30, 1942

Before Sibley, Hutcheson, and Holmes, Circuit Judges

BY THE COURT:

The appellant Lonnie E. Smith sued the appellees because they denied him the privilege of voting at a Democratic

Primary and a run-off election in Texas held July 27, 1940, and Aug. 24, 1940, for the choice of candidates for United States Senator and Congressmen, for Governor of the State, and other State officers, asking a declaration of his right to vote, and for \$5,000 damages. The facts are stipulated and include these: Appellant is a native citizen qualified to vote under the State laws for the officers above mentioned, but is a colored person. He believes in Democratic principles and has never voted for the candidates of any other party. He was not allowed to vote in the primary because of his color, the State Democratic Party in convention assembled having in 1932 resolved that only white citizens of the State qualified to vote shall be eligible to membership and to participate in the party's deliberations. With two exceptions, Democratic nominees for Congress, Senate and Governor have been elected in Texas since 1859. The principal question is whether the primary, held under the provisions of the State statutes, is an election in which this voter has a right to vote by virtue of the provisions relating to voters of the Federal and State Constitutions, or is a mere party procedure, participation in which may be controlled by the party holding it. The trial court thought *Grovey vs. Townsend*, 295 U. S. 45, controlling and dismissed the petition. This appeal followed.

The Texas statutes regulating party primaries which were considered in *Grovey vs. Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this. It is argued that different principles were announced by the Supreme Court in *United States vs. Classic*, 313 U. S. 301. The latter was a criminal case from Louisiana, and did not involve the Texas statutes. It differs in many points from this case. The opinion of the court in that case did not overrule or even mention *Grovey vs. Townsend*. We may not overrule it. On its authority the judgment is Affirmed.

A True copy:

Teste:

— — —, Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

[fol. 153]

JUDGMENT

Extract from the Minutes of November 30, 1942

No. 10382

LONNIE E. SMITH,

versus

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Lonnie E. Smith, and the sureties on the appeal bond herein, A. A. Lucas and Julius White, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 154-159] PETITION FOR REHEARING—Filed December 19, 1942

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 10382

LONNIE E. SMITH,

Appellant,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Appellees.

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Appellant, Lonnie E. Smith within 21 days after the filing of the opinion in the above entitled cause on November 30, 1942, and petitions the Court to grant Appellant a rehearing thereof on the grounds that

questions decisive of the case and fully submitted by Counsel in brief and argument have been overlooked by the Court and that the decision violates Article I and Amendments 14, 15, and 17 of the United States Constitution and is in conflict with the controlling decision of the United States Supreme Court.

I.

The opinion in this case states:

"The Texas statutes regulating party primaries which were considered in *Grovey v. Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this."

The instant case is different from the case of *Grovey v. Townsend*. *Grovey v. Townsend* was decided by the United States Supreme Court upon a skeleton record which included only the pleadings in the case and did not include any evidence at all. In the instant case there is not only a question of pleadings, but also full stipulations of facts and oral testimony which gives for the first time a full and complete picture of the question of the operation of the Democratic primary elections in Texas. It appears from the record in this case that the Democratic primary in Texas is not limited to Democrats, but is open to all white qualified electors regardless of the party to which they might belong (R. 81, 106). The record of the instant case also shows that the Democratic Party in Texas is a voluntary association of individuals without any rules governing membership and without any defined membership in fact (R. 119). There are no constitution, by-laws, nor fixed

rules for the Democratic Party (R. 133, 146). There are no fixed rules for the "government of the affairs of the party" other than the election laws of the State of Texas (R. 133-134). There are no rules for the holding of primary elections other than the election laws of Texas (R. 133). These and many other facts clearly set out in the record of the instant case did not appear in the record in the case of *Grovey v. Townsend*.

II.

The decision in the instant case is in conflict with the decision in the case of the *U. S. v. Classic*, 313 U. S. 301. The *ratio decidendi* in the *Classic* case is that:

" * * * Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1 and 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law, made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes never determines the ultimate choice of the representative. Here, *even apart from* the circumstance that the Louisiana primary is made by law an * * * (319)

* * * integral part of the procedure of choice, the right to choose by a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical in-

fluence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry v. United States*, *supra* (256 U. S. 263-269, 287, 65 L. Ed. 923-926, 932, 933, 41 S. Ct. 469)." (Italics ours.) (313 U. S. 301, 318-319)

It is apparent from the above that the two bases for decision in the *Classic* case are alternatives in the disjunctive rather than a single basis as the opinion in the present case assumes. Although this Court in its per curiam opinion mentions the question of whether or not the statutes of Texas make the primary elections an integral part of the election machinery, the alternative ground for relief in the *Classic* case is ignored; namely, the circumstance that "in fact the primary effectively controls the choice." In the instant case it was admitted by appellees, and remains unchallenged in the record that in Texas the Democratic primary election is the only place where a qualified elector can make an effective choice of candidates.

It should also be noted that the *Grovey* case was decided solely on whether or not the Democratic primary of Texas violated the Fourteenth Amendment. Neither the record nor the decision in that case made any mention of Article I of the United States Constitution. The jurisdiction of the instant case is based not only on the Fourteenth and Fifteenth Amendments but also on Article I and Amendment Seventeen of the United States Constitution. The precedent of the United States controlling these points is the *Classic* case and not the *Grovey* case.

III.

Further grounds for urging a rehearing and reconsideration of the decision that the instant case has been predetermined by the decision of *Grovey v. Townsend*, is to be found in the language of Mr. Justice BRANDEIS in his dissenting opinion in the case of *Burnet v. Coronado Oil & Gas Co.*

"The doctrine of *res judicata* demands that a decision made by the higher court, whether it be a determination of a fact or a declaration of a rule of law, shall be accepted as a final disposition of the particular controversy, even if confessedly wrong. But the decision of the Court, if, in essence, merely the determination of fact, is not entitled, in later controversies between other parties, accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. * * * (285 U. S. 393, 412 [1932])

CONCLUSION

A comparison of the record in the instant case with the record in the case of *Grovey v. Townsend* demonstrates clearly that the two cases are different on a factual basis. As to the law involved, a comparison of the statutes and record in the instant case with the case of *U. S. v. Classic* shows clearly that this question is within the rule in the *Classic* case, so that as to facts, this case is not prejudged by the case of *Grovey v. Townsend* and as to the law, the instant case is bound by the rule of the case of the *U. S. v. Classic*.

We, therefore, respectively urge that a rehearing be granted the appellant in this case.

Respectfully submitted,

THURGOOD MARSHALL,
New York.

W. J. DURHAM,
Sherman, Texas,
Attorneys for Appellant.

WILLIAM H. HASTIE,
Washington, D. C.

W. ROBERT MING, JR.,
Chicago, Ill.

GEORGE M. JOHNSON,
San Francisco, Calif.

LEON A. RANSOM,
Columbus, Ohio.

CARTER WESLEY,
H. S. DAVIS, JR.,
Houston, Texas,
Of Counsel.

[fol. 160]

ORDER DENYING REHEARING**Extract from the Minutes of January 21, 1943.****No. 10382****LONNIE E. SMITH,****versus****S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas**

**It is ordered by the Court that the petition for rehearing
filed in this cause be, and the same is hereby, denied.**

**[fol. 161] Clerk's Certificate to foregoing transcript omit-
ted in printing.**

[fol. 162] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 7, 1943

**The petition herein for a writ of certiorari to the United
States Circuit Court of Appeals for the Fifth Circuit is
granted.**

**And it is further ordered that the duly certified copy
of the transcript of the proceedings below which accom-
panied the petition shall be treated as though filed in re-
sponse to such writ.**

(7154)

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1943

No. 949 51.

LONNIE E. SMITH,

Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LIUZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas,

Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF, TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.**

✓ THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,
Attorneys for Petitioner.

✓ WILLIAM H. HASTIE,
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✓ W. ROBERT MING, JR.,
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✓ LEON A. RANSOM,
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✓ PRENTICE THOMAS,
Louisville, Ky.,

✓ CARTER WESLEY,
Houston, Texas,
Of Counsel.

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IN THE
Supreme Court of the United States

October Term, 1943

No.

LONNIE E. SMITH,
Petitioner,

vs.

**S. E. ALLWRIGHT, Election Judge, and
JAMES J. LUIZZA, Associate Election
Judge, 48th Precinct of Harris County,
Texas,**

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

Petitioner Lonnie E. Smith, appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 152), which affirmed a final judgment for the respondents, defendants below, by the District Court of the United States for the Southern District of Texas, Houston Division (R. 85-87).

The opinion of the Circuit Court of Appeals appears in the record herein (R. 150-151) and is reported in 131 F. (2d) 593.

The jurisdiction of this Court is invoked under Section 240(2) of the Judicial Code (28 U. S. C., sec. 347 (a)).

PART ONE.

Summary Statement of Matter Involved.

I.

Statement of the Case.

The amended complaint alleged that on July 27, 1940, and on August 24, 1940, the respondents, acting as election judges of the 48th Precinct of Harris County, Texas, denied the petitioner and other qualified electors the right to vote in the primaries for selection of candidates of the Democratic party for the offices of U. S. Senator and Representatives in Congress. Petitioner sought damages for himself and a declaratory judgment on behalf of himself and others similarly situated that the actions of the respondents in refusing to permit qualified Negro electors to vote in these primaries violated Sections 31 and 43 of Title 8 of the United States Code in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article I, and the 14th, 15th, and 17th Amendments of the United States Constitution (R. 4-16). The amended answer admitted that respondents refused to permit petitioner to vote, but denied that their actions violated the United States Constitution or laws, because the Democratic primary in

Texas was "a political party affair" not subject to federal control (R. 59-71). Both parties agreed to stipulations as to certain material facts (R. 71-76).

The case was heard upon the stipulations (R. 71-76), depositions (R. 118-147), and oral testimony (R. 96-109). On May 11, 1942, District Judge T. M. KENNERLY filed Findings of Fact and Conclusions of Law (R. 80-85), and on May 30, 1942, entered a final judgment that: (1) the petitioner "take nothing against" respondents, and (2) issued a declaratory judgment "that the practice of the defendants (respondents here) in enforcing and maintaining the policy, custom, and usage of which plaintiff (petitioner here) and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the Fourteenth, Fifteenth, or Seventeenth Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).¹

Notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed by petitioner on June 6, 1942 (R. 148). On November 30, 1942, the United States Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court (R. 153).² Petition for rehearing was promptly filed and denied on January 21, 1943, without opinion (R. 160).

¹ The District Court reached the conclusion: "I, therefore, follow *Grovey v. Townsend*, and render judgment for defendants" (R. 85).

² The *per curiam* opinion of the Circuit Court of Appeals concluded: "The opinion in that case (*U. S. v. Classic*) did not overrule or even mention *Grovey v. Townsend* (*supra*). We may not overrule it. On its authority the judgment is affirmed" (R. 152).

II.

Salient Facts.

All parties to this action, both petitioner and respondents, are citizens of the United States and of the State of Texas, and are residents and domiciled in said State (R. 71).

Petitioner is a Negro, native born citizen of the United States residing in Houston, Harris County, Texas, and has been a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification (R. 71).

Petitioner is a believer in the tenets of the Democratic party and, as found by the district judge, is a Democrat (R. 81).

On July 27, 1940, a primary, and on August 24, 1940, a "run off" primary were held in Harris County, Texas, for nomination of candidates upon the Democratic ticket for the offices of U. S. Senator, U. S. Congressman, Governor and other State and local officers. Prior to this time the respondents were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas (R. 72, 81).

On July 27, 1940, petitioner presented himself to vote in the said Democratic primary, at the regular polling place for the 48th Precinct with his poll tax receipt and requested to be permitted to vote. Respondents refused him a ballot because of his race and color, in accordance with alleged instructions of the Democratic party of Texas (R. 73, 81).

The State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article

2955 of the Revised Civil Statutes of Texas, which statute sets forth identical qualifications for voting in both "primary" and "general" elections (R. 11, 12, 23).

Primaries in Texas are created, required and controlled in minute detail by an intricate statutory scheme.³

According to the stipulations of facts made a part of the Findings of Facts of District Court: "At all times material herein the only State-Wide Primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

While there is a statutory provision requiring the payment of certain primary election expenses by the candidates, all other expenses are borne by the State of Texas. The County Clerk, the Tax Assessor and Collector, and the County Judge of Harris County all performed duties required of them under Articles 3100-3153, Revised Civil Statutes of Texas, in connection with holding of the primaries on July 27, 1940 and August 24, 1940, without cost to the candidates, or the Democratic party, or any official thereof (R. 73).

After such primary the names of the candidates receiving the nomination are certified by the County Executive

³ The present election laws of Texas originated with the so-called "Terrell Law," being "An Act to regulate elections and to prescribe penalties for its violation" (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82 to 107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C filed herewith.

Sections of the Constitution of the State of Texas and Sections of the Texas Election statutes are set forth in Appendix D filed herewith.

Committee to the State Executive Committee; the State Executive Committee, in turn, certifies said nominees to the Secretary of State who places the names of these candidates on the General Election Ballot to be voted on in the General Election. Such services are rendered by the Secretary of State as a part of his governmental function and are paid for by the State of Texas. Said Secretary of State also certifies other Party candidates as well as Independent candidates for places upon the General Election Ballot; such services as rendered by the Secretary of State are paid by the State of Texas (R. 74).

Although some of the expenses of the primary elections are paid by the Harris County Democratic Executive Committee (R. 76), it is admitted: "that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned pro rata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied" (R. 76).

The stipulation of facts agreed upon by petitioner and respondents provides that: "Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas with two exceptions" (R. 72).

PART TWO.

Question Presented.

Does the Constitution of the United States prohibit the exclusion of qualified Negro electors from voting in primary elections which are an integral part of the election machinery of the State and which are determinative of the choice of federal officers?

PART THREE.

Reasons Relied on for Allowance of the Writ.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS INCONSISTENT WITH THE DECISION OF THIS COURT IN UNITED STATES V. CLASSIC.

II. RATIO DECIDENDI OF GROVEY V. TOWNSEND SHOULD BE RE-EXAMINED IN THE LIGHT OF NEW FACTS DISCLOSED BY THE PRESENT RECORD.

III. INCONSISTENCY BETWEEN THE DECISIONS OF THIS COURT IN GROVEY V. TOWNSEND AND UNITED STATES V. CLASSIC APPARENT IN THEIR APPLICATION TO THE INSTANT CASE SHOULD BE RESOLVED.

A. GROVEY V. TOWNSEND AND UNITED STATES V. CLASSIC PRESENT INCONSISTENT THEORIES AS TO FEDERAL AUTHORITY OVER PRIMARIES WHICH DECIDE ELECTIONS.

B. GROVEY V. TOWNSEND AND UNITED STATES V. CLASSIC PRESENT INCONSISTENT THEORIES OF WHAT CONSTITUTES "STATE ACTION" IN THE CONDUCT OF PRIMARIES.

Conclusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, should be granted.

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IN THE
Supreme Court of the United States

October Term, 1943

No.

LONNIE E. SMITH,
Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge, and
JAMES J. LUIZZA, Associate Election
Judge, 48th Precinct of Harris County,
Texas,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 593, as well as in the record filed in this cause (R. 150-151).

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240(2) of the judicial code (28 U. S. C. Sec. 347 (A)).

The date of the judgment in this case is November 30, 1942 (R. 152). Petition for rehearing was filed within the

time provided by the Rules of the Circuit Court of Appeals for the Fifth Circuit and was denied on January 21, 1943 (R. 160).

Statement of the Case.

The statement of the case and a statement of the salient facts from the record are fully set forth in the accompanying petition for certiorari. Any necessary elaboration on the finding of the points involved will be made in the course of the argument.

Errors Below Relied Upon Here.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS INCONSISTENT WITH THE DECISION OF THIS COURT IN *UNITED STATES V. CLASSIC*.

II. *RATIO DECIDENDI* OF *GROVEY V. TOWNSEND* SHOULD BE RE-EXAMINED IN THE LIGHT OF NEW FACTS DISCLOSED BY THE PRESENT RECORD.

III. INCONSISTENCY BETWEEN THE DECISIONS OF THIS COURT IN *GROVEY V. TOWNSEND* AND *UNITED STATES V. CLASSIC* APPARENT IN THEIR APPLICATION TO THE INSTANT CASE SHOULD BE RESOLVED.

Argument.

I.

The decision of the Circuit Court of Appeals in this case is inconsistent with the decision of this Court in *United States v. Classic*.

In his complaint petitioner charged that respondents had violated Sections 31 and 43 of Title 8, United States Code, in that they had subjected him to a deprivation of rights

secured by Sections 2 and 4 of Article I and the 14th, 15th, and 17th Amendments of the Constitution of the United States. The courts below held that the petitioner, a qualified elector of the State of Texas, could not maintain an action for damages against the respondents, Democratic primary election judges, who refused to permit petitioner and other qualified electors to vote in the Democratic primary election held July 27, 1940, and August 24, 1940, in voting precinct 48, Harris County, Texas. Those rulings were inconsistent with the decision of this Court in *United States v. Classic*, 313 U. S. 299 (1941).

Petitioner seeks to maintain this action to obtain redress for deprivation of a constitutional right specifically recognized and described by this Court in the *Classic* case. There, relying on Section 2 of Article I this Court said: "The right of the people to choose (Congressmen) . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right" (313 U. S. 299, 314).

In the *Classic* case, as in the instant case, the acts complained of had been committed in connection with primary elections. Nevertheless, this Court concluded that those acts were an interference with a right "secured by the Constitution," saying:

"Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted in the primary, is rightfully included in the right in Article I, Section 2. This right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right

at a party primary which invariably, sometimes or never determines the ultimate choice of the representative" (313 U. S. 299, 318).¹

In the instant case the record demonstrates that the laws of the State of Texas have made the primary "an integral part of the procedure of choice." No valid distinction can be drawn between the Texas and Louisiana statutes in this connection.² Moreover, the history of Texas elections shows that the Democratic primary "effectively controls the choice" of the elected representatives in the State,³ and respondents in this case have so stipulated.⁴

While *United States v. Classic*, *supra*, was a criminal case, the statutory prohibition (18 U. S. C. sec. 51, 52), involved there closely parallels Section 43 of Title 8 of the

¹ Compare statement by Holmes, J., in *Nixon v. Herndon* (273 U. S. 536, 540) 1927.

"If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

² See Appendix B for a comparative table of the Texas and Louisiana constitutional and statutory provisions applicable to primary elections.

³ See: *American Parties and Elections* by Edward A. Sait (1942), pp. 63 *et seq.*; *The Fate of the Direct Primary* by Charles Evans Hughes, 10 National Municipal Review 23, 24; *Party Government in the House of Representatives* by Hasbrouck (1927) pp. 172; 176, 177; *Primary Elections* by Merriam and Overacker (1928) pp. 267-279.

On the great decrease in the vote cast in the general election from that cast at the primary in "one-party" areas of the country, see George C. Stoney, *Suffrage in the South*, 29 Survey Graphic 163, 164 (1940). In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

⁴ Both parties agreed to the following stipulation: "Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions" (R. 72).

United States Code upon which petitioner here relies. These sections of the United States Code are parts of the same Acts of Congress, the legislative history of which demonstrates that they were intended to provide both civil and criminal redress for the same wrongs.⁵ Both the criminal sanction of Section 52 of Title 18 and the civil sanction of Section 43 of Title 8 are aimed at any deprivation of con-

⁵ After the adoption of the 13th Amendment, a bill, which became the first Civil Rights Act (14 Stat. 27) was introduced, the major purpose of which was to secure to the recently freed Negroes all the civil rights secured to white men including language similar to that in Section 43 of title 8 and section 52 of title 18. The 2nd Civil Rights Act (16 Stat. 140—16 Stat. 433) was passed for the express purpose of enforcing the provisions of the 14th Amendment. The third civil rights act, adopted April 20, 1871 (17 Stat. 13), reenacted the same provisions.

Section 43 of Title 8 and Section 52 of the United States Civil Code were both parts of the same original bill and although one provides for civil redress and the other for criminal redress, the language of the two sections is closely similar:

Sec. 43 of Title 8

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

Sec. 52 of Criminal Code

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000, or imprisoned not more than one year, or both." (R. S. Sec. 5510; Mar. 4, 1909, c. 321, sec. 20, 35, Stat. 1092.)

stitutional right "under color of any statute, ordinance, regulation, custom, or usage of any state or territory." Election judges in Texas, just as in Louisiana, have authority to act in primary elections only by virtue of the State laws.⁶ The decision of the Court below is inconsistent with the determination made by this Court in the *Classic* case that the "alleged acts of appellees were committed in the course of their performance of duties under Louisiana statutes requiring them to count the ballots, to record the result of the count, and to certify the result of the elections. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law" (313 U. S. 299, 325-326).⁷

Moreover, this Court having found that the misconduct of primary election officials in the *Classic* case constitutes action taken "under color of state law" within the meaning of Section 52 of Title 18, United States Code, it necessarily follows that similar misconduct here involves "state action" within the meaning of the 14th Amendment.⁸ Where such misconduct is discrimination on account of the race or color of the complaining voter, there is, likewise, a violation of the 15th Amendment and section 31 of Title 8 of the United States Code which is a part of an original act entitled, "A Bill to Enforce the Right of Citizens of the

⁶ See Appendix B.

⁷ Section 43 of Title 8 has been used repeatedly to enforce the right of citizens to vote without discrimination because of race or color. See: *Myers v. Anderson*, 238 U. S. 368 (1914); *Lane v. Wilson*, 307 U. S. 268 (1939).

⁸ Cf. *Ex Parte Virginia*, 100 U. S. 339, 346 (1879); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278 (1913); *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 507, 519 (1939).

United States to Vote in the Several States of this Union and for other purposes" (17 Stat. 13).⁹

It is, therefore, submitted that the decision of the Circuit Court of Appeals affirming the action of the District Court in this case is inconsistent with the decision of this Court in *United States v. Classic*, *supra*.

II.

Ratio decidendi of *Grovey v. Townsend* should be re-examined in the light of new facts disclosed by the present record.

The record formerly before this Court in *Grovey v. Townsend*, 295 U. S. 45 (1935), failed to reveal or present facts essential to an adequate legal appraisal of the so-called "white primary". That decision had no proper basis in the actualities of the Texas system, and should be re-examined in the light of facts now revealed for the first time in the present record. In the words of Mr. Justice BRANDEIS:

"Not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile." *Burnett v. Coronado Oil and Gas Co.*, 285 U. S. 393, 412 (1932).

In *Grovey v. Townsend*, *supra*, this Court decided that the present method of excluding Negroes from voting in the Texas Democratic primary elections did not involve such state action as is comprehended by the 14th and 15th

⁹ *Myers v. Anderson* (*supra*).

Amendments. Because the exclusionary practice was predicated upon a resolution of the State Democratic Convention, and in the light of the record then at hand, this Court failed to find any decisive interposition of state force in the primary election.

Grovey v. Townsend, supra, was decided upon demurrer to a petition for damages filed in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. That record provided no factual picture of the organization and operation of the so-called Democratic party of Texas and permitted the assumption that the "party" had the basic structure and defined membership which are characteristic of an organized voluntary association. Moreover, on that record, this Court assumed that the privilege of voting in the Democratic primary election was an incident of "party membership" and restricted to members of an organized voluntary association called the "Democratic party."¹⁰ The present record and the following analysis will show that these supposed facts, vital to the decision in *Grovey v. Townsend, supra*, did not exist.

The problem in *Grovey v. Townsend, supra*, as in the present case, was the determination and evaluation of the participation of government on the one hand, and the so-called "Democratic party" on the other hand, in Texas primary elections with a view to deciding whether the conduct of these elections was, in legal contemplation, a governmental function subject to the restraints of the 14th

¹⁰ "While it is true that Texas has by its laws elaborately provided for the expression of party preferences as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary * * *" (296 U.S. 45, 50).

and 15th Amendments or a private enterprise not so restricted. The complaint described in detail the state statutes creating, requiring, regulating, and controlling the conduct of primary elections in Texas. These circumstances were summarized in the opinion of this Court (295 U. S. 45, 49-50).

In contrast, the nature, organization and functioning of the "Democratic party" were nowhere adequately described. Instead, the Court found it necessary to rely upon a general conclusion of the Supreme Court of Texas in *Bell v. Hill*, 123 Tex. 531, 74 S. W. (2d) 113 (1938), that the "Democratic party" of Texas is a voluntary association for political purposes, functioning as such in determining its membership and in controlling the privilege of voting in its primaries.¹¹

Now, for the first time, this Court has significant facts before it which permit an independent examination of the "party" and its functioning and a meaningful comparison of the roles of state and "party" in Texas primary elections. The present record shows that in Texas the Democratic primary is not, as was assumed in *Grovey v. Townsend*, *supra*, an election at which the members of an organized voluntary political association choose their candidates for public office.

First, any *white* elector, whether he considers himself Democrat, Republican, Communist, Socialist, or non-partisan, may vote in the "Democartie" primary. The testi-

¹¹ *Bell v. Hill* was decided by the Supreme Court of Texas on an original motion for leave to file a petition for mandamus. As in the *Grovey* case there were no facts presented or evidence of either the "Democratic Party" or the actual functioning of the election machinery.

mony of the respondent Allwright is positive and stands unchallenged on this point.

"Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.

Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.

Q. And Negroes are not permitted to vote in the primary election? A. They don't vote in the primary.

Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.

Q. And you do let them vote? A. Yes" (R. 106).

Second, the "Democratic party" of Texas has no identified membership and no structure which would make its membership determinable. Under these circumstances, it is impossible to restrict voting in the primary election to "party members." The testimony of E. B. Germany, Chairman of the Democratic State Executive Committee, illustrates this point (R. 119).

Third, the "Democratic party" in Texas is not organized. Officials claiming to represent the "party" testified positively that the "party" has no constitution nor by-laws (R. 146), and is a "loose jointed organization" (R. 126). No minutes or records of the periodic "party" conventions are preserved. (R. 131). The "party" has no officers between conventions (R. 125, 143). Beyond the lack of organic party law, there is no formulated body of party

doctrine. No resolutions of the state conventions are preserved (R. 137). Even the resolution upon which the exclusion of Negroes from the primaries is predicated is not a matter of record and has no existence as a document (R. 136). At the trial, the alleged contents of the resolution were proved, over the objection of the petitioner, by the recollection of a witness who testified that he had introduced such a resolution, and was present when it was adopted (R. 138).

The only rules and regulations governing the "Democratic party" and the "Democratic primary" elections are the election laws of the State of Texas (R. 133-134). This startling state of affairs is perhaps the most striking evidence of a one-party political system where for all practical purposes the "Democratic party" is co-extensive with the body politic and, hence, needs no private organization to distinguish it from other parties.

In such circumstances the legal character of the primary elections, and the status of those who conduct them, can be derived only from the one organized agency, which creates, requires, regulates and controls these elections, namely, the State of Texas. The factual material supplied in this record, but not available in the record of *Grovey v. Townsend, supra*, compels this conclusion. Inadequately informed, this Court sanctioned the practical disenfranchisement of 540,565 adult Negro citizens, 11.86% of the total adult population (citizens) of Texas.¹² It is for the correction of this error and the resultant deprivation of constitutional right that the present petition is submitted.

¹² United States Census (1940). (Figures include native born and naturalized adult citizens.)

III.

Inconsistency between the decisions of this Court in *Grove v. Townsend* and *United States v. Classic* apparent in their application to the instant case should be resolved.

The District Court and the Circuit Court of Appeals refused to follow the decision in *United States v. Classic*, *supra*, because of their belief that the instant case was controlled by the earlier decision in *Grove v. Townsend*, *supra*. The District Court concluded: "I, therefore, follow *Grove v. Townsend*, and render judgment for Defendants" (R. 85). The Circuit Court of Appeals likewise followed the *Grove* case in affirming the lower court. In a *per curiam* opinion it was stated:

"The Texas statutes regulating party primaries which were considered in *Grove v. Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this. It is argued that different principles were announced by the Supreme Court in *United States v. Classic*, 313 U. S. 301. The latter was a criminal case from Louisiana, and did not involve the Texas statutes. It differs in many points from this case. The opinion of the court in that case did not overrule or even mention *Grove v. Townsend* (*supra*). We may not overrule it. On its authority the judgment is affirmed" (R. 152).

In thus following the *Grove* case rather than the *Classic* case, the District Court and the Circuit Court of Appeals made a choice between apparently inconsistent legal theories of this Court as to federal control over primaries.

A. *Grovey v. Townsend* and *United States v. Classic* present inconsistent theories as to Federal authority over primaries which decide elections.

The decision in the *Grovey* case was based on the theory that the right to participate in the Democratic Primary is one of the privileges incidental to membership in the Democratic Party of Texas and should not be confused with "the right to vote." Thus, the opinion stated:

"The complaint states that . . . in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. . . . The argument is that as a Negro may not be denied a ballot at a general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of race or color is prohibited by the Federal Constitution" (295 U. S. 45, 54).¹³

In following the decision in the *Grovey* case the lower courts ignored the reasoning in the *Classic* case that in a state where choice at the primary is tantamount to election, the right to vote in the primary is derived not from the party but from the Constitution. In the *Grovey* case the

¹³ Similar reasoning appears throughout the *Grovey* decision: e. g., "Here the qualifications of citizens to participate in party counsels and to vote at primaries has been declared by the representatives of the party in convention assembled, and this action upon its face is not state action" (295 U. S. 45, 48).

question as to whether or not federal authority extended to primary elections was approached by a consideration of the relation between the Democratic primary elections and the "Democratic party" in Texas. In the *Classic* case the Court viewed as controlling the fundamental relationship between the Democratic primary elections and the choice of office-holders. The Court was not concerned with who ran the machinery but with the practical operation of that machinery upon the expression of choice.¹⁴

The *Grovey* case was a complaint for damages in a state court based solely upon the Fourteenth and Fifteenth Amendments, and this Court, therefore, centered its attention upon the question of what constituted "state action" under those Amendments. Yet the language of the opinion is so broad as to create the impression that the effect of the primary in controlling the choice of office-holders has no bearing whatsoever upon the question of federal authority over the conduct of primary elections. The lower courts here gave this all-inclusive effect to the language of the *Grovey* case thereby ignoring the decision of this Court in the *Classic* case that the right to vote in such a primary is derived from the Constitution and protected by federal statutes not involved in the *Grovey* case.

¹⁴ "The right of the people to choose (Congressmen), * * * is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right" (313 U. S. 299, 314):

B. *Grovey v. Townsend and United States v. Classic* present inconsistent theories of what constitutes "state action" in the conduct of the primaries.

The Louisiana and Texas election statutes are substantially alike. On the basis of the Louisiana election laws this Court in the *Classic* case concluded that the Democratic primary in Louisiana was "an integral part of the election machinery of Louisiana and that the election officials who refused to count the ballots of qualified electors in the primary election in Louisiana were rightfully charged with violation of Sections 19 and 20 of the Criminal Code (18 U. S. C., secs. 51 and 52) because "misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken 'under color of' state law" (313 U. S. 299, 326). But in the *Grovey* case the action of officials conducting a primary election which was similarly created, required, regulated and controlled by the State was held not to be "state action." The essential inconsistency is that in the *Classic* case the Court decided the issue of state action by examining the relation of the state to the enterprise in which the election judges were engaged, while in the *Grovey* case the Court disregarded this relationship and gave legal effect to the circumstances that the particular act complained of was not authorized by the state. If the *Grovey* doctrine had been applied in the *Classic* case it would have led to the conclusion that the election frauds were not "under color of state law" because they were not authorized by the state.

It is these conflicts between the theories of *United States v. Classic* and *Grovey v. Townsend* which should be resolved, and resolved in accordance with the sound theory in the *Classic* case.

Conclusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, should be granted.

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IN THE

Supreme Court of the United States**October Term, 1943****No. 849 51****LONNIE E. SMITH,***Petitioner,**vs.***S. E. ALLWRIGHT, Election Judge, and JAMES E. LIUZZA,**
Associate Election Judge, 48th Precinct of Harris County,
Texas,*Respondent.***PETITIONER'S APPENDICES.****THURGOOD MARSHALL,**
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APPENDIX A.

The Constitution of the United States:

Article I, Section 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Article I, Section 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Fourteenth Amendment to the Constitution of the United States:

Section 1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifteenth Amendment to the Constitution of the United States:

Section 1, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Seventeenth Amendment to the Constitution of the United States:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Section 31 of the United States Code:

"Race, color, or previous condition not to affect right to vote."

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, customs, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

Section 43 of Title 8, United States Code:

"Civil action for deprivation of rights"

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

APPENDIX B.

Comparative Table—Texas and Louisiana Constitutional and Statutory Provisions Applicable to Primary Elections.

(Note: This comparison is based upon the case of *U. S. v. Classic* and the specific statutory provisions relied upon there as showing the primary election to be an integral part of the election machinery of the state.)

LOUISIANA

1. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representatives by direct primary elections. (Louisiana Act No. 46, Regular Session, 1940, Sections 1 and 3.)
2. The primary is conducted by the state at public expense. (Act No. 46 supra, sec. 35.)

TEXAS

1. All political parties, which are defined as those that cast 1000 or more votes at the last general election, are required to nominate their candidates for representatives, etc., in primary elections. (Vernon's Revised Civil Statutes (1936), Art. 3101.)
2. The primary is conducted by an election judge and associate election judge, appointed by the chairman of the county executive committee of the party (Revised Statute supra, Art. 3104), at the expense of

LOUISIANA

3. The ballots are printed at public expense (Sec. 35 of Act No. 46, supra).
4. Are furnished by the Secretary of State (Sec. 36).
5. In a form prescribed by statute (Sec. 37).
6. Close supervision of the delivery of the ballots to the election commissioners is prescribed (secs. 43-46).
7. The polling places are required to be equipped to insure secrecy (Sec. 48-50; secs. 54-57).
8. The selection of election commissioners is prescribed (Sec. 6).

TEXAS

- the candidate for nomination at the various primary elections (Art. 3108).
3. The ballots are printed at the expense of the candidates (Art. 3108, supra).
 4. Are furnished by the county committee in each county (Art. 3109).
 5. In a form prescribed by statute (Art. 3109).
 6. Close supervision of and responsibility for the delivery to the presiding judge of the supplies necessary to hold the election is prescribed (Art. 3119).
 7. "The same precautions required by law to secure the ballot box in general elections, in regard to the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections." (Art. 3122)
 8. The selection of the presiding judge and other primary officials is prescribed (Art. 3104).

LOUISIANA

9. And their duties detailed.
10. The commissioners must swear to conduct the election impartially (sec. 64).
11. And are subject to punishment for deliberately falsifying the returns or destroying the lists and ballots.
12. They must identify by certificate the ballot boxes used (sec. 67).
13. Keep a triplicate list of voters (sec. 68).
14. Publicly canvass the return (sec. 74).
15. And certify the same to the Secretary of State (sec. 75).
16. The Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act (Act 46, sec. 1).

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9. And their duties detailed (Art. 3105).
10. The election judges are required to take the oath required of such officers in general elections (Art. 3104).
- 11.
12. They must identify by certificates the ballot boxes used (Art. 3124).
13. Keep a triplicate list of voters (Art. 3124).
14. Returns canvassed by the county executive committee of the party (Art. 3124-3125).
15. And certify the same to the county clerk (Art. 3125, 3127).
16. "... No name shall appear on the official ballot except that of a candidate who was actually nominated (either as a party nominee or as a non-partisan or independent candidate) in accordance with the provisions of this title ..." (Art. 2978).

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17. One whose name does not appear on the primary ballot, if otherwise eligible to become a candidate at the general election, may do so either of two ways: by filing nomination papers with the requisite number of signatures or by having his name "written in" on the ballot of the final election. (Louisiana Act. No. 224, Regular Session 1940, sec. 50; 73.) "No one who participates in the primary election, of any political party shall have the right to participate in a primary election of any political party with the view of nominating opposing candidates or candidates; nor shall he be permitted to be himself a candidate in opposition to anyone nominated at or through a primary election in which he took part." (Sec. 87).
18. "No person whose name is not authorized to be printed on the official ballot, as the nominee of a political party or as an independent candi-

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17. One whose name does not appear on the primary ballot, if otherwise eligible to become a candidate, may do so by securing and filing nomination papers with the requisite number of signatures, provided that one who has voted in a primary election in which candidate was chosen for office may not sign petition in favor of another's nomination to said office (Art. 3159-3160).

One who was defeated in a primary election which selected a candidate for U. S. Senator, may not seek nomination as an independent or non-partisan candidate in opposition to the candidate selected in the primary (Art. 3096).

18. (See Art. 3159, supra) A citizen in whose favor an application is made for a place on the ballot as an independent candidate, "shall first file

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date, shall be considered a "candidate" unless he shall file in the appropriate office at least ten days, before the general election a statement containing the correct name under which he is to be voted for, and containing the further statement that he is willing and consents to be voted for that office. (Sec. 15, Article VIII of the Constitution of La. as amended by Art. 80 of 1934)

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his written consent with the Secretary of State" to become a candidate, within thirty days after primary election day (Art. 3161).

APPENDIX C.

Summary and Comparison of Provisions of Revised Statutes of Texas for Elections.

<p>ELECTION LABELED "GENERAL ELECTION" AND HELD NOVEMBER 5, 1940</p>	<p>ELECTION LABELED "PRIMARY ELECTION" HELD JULY 27, 1940</p>
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- | | |
|--|---|
| <ol style="list-style-type: none"> 1. Held under compulsion of Article 2930 of Revised Civil Statutes of Texas, 1925. 2. Date fixed by Article 2930. 3. Article 2930 fixes time of day for holding election. 4. Article 2930 requires that all election officials shall be qualified voters. 5. Article 2933 fixes same qualifications for voting in this election as in "statutory primary election." 6. Article 2956 (Absentee Voting) is same for this election as for "statutory primary election." 7. Article 2978 provides that only Official Ballot shall be used. | <ol style="list-style-type: none"> 1. Held under compulsion of Article 3101 of Revised Civil Statutes of Texas, 1925. 2. Date fixed by Article 3102. 3. Article 2930 fixes time of day for holding election. 4. Article 2930 requires that all election officials shall be qualified voters. 5. Article 2955 fixes same qualifications for voting in this election as in election labeled "general election." 6. Article 2956 (Absentee Voting) is the same for this election as for general election. 7. Article 2978 provides that only Official Ballot shall be used. |
|--|---|

"GENERAL ELECTION"

8. Articles 2980-2941 provide form of ballot and how to mark ballot.
9. Article 2984 fixes the number of ballots to be provided.
10. Articles 2986, 2987, and 2990 provide for voting booths, guard rails, and ballot boxes for this election.
11. Article 2998 fixes oath to be taken by officials in this election.
12. Power of judges fixed by Article 3002 as follows:

"Judges of election are authorized to administer oaths to ascertain all facts necessary to a fair and impartial election. The presiding judge of election, while in the discharge of his duties as such, shall have the power of the district judge to enforce order and keep the peace. He may ap-

"PRIMARY ELECTION."

8. Articles 3109, 3110 provided form and contents of ballot. Also, Art. 3109 fixes method of marking ballot.
9. Article 3109 fixes number of ballots to be provided.
10. Article 3120 provides that voting booths, guard rails, and ballot boxes of "general election" may be used in compulsory statutory primary election.
11. Article 3104 requires officials of this election to take same oath as officials of "general election."
12. Power of judges fixed by article 310; as follows:

"Judges of primary elections have the authority, and it shall be their duty to administer oaths, to preserve order at the election, to appoint, special observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the

"GENERAL ELECTION"

point special peace officers to act as such during the election and may issue warrants of arrest for felony, misdemeanor or breach of peace committed at such election, directed to the sheriff or any constable of the county, of such special peace officer, who shall forthwith execute any such warrants, and, if so ordered by the presiding judge, confine the party arrested in jail during the election or until the day after the election, when his case may be examined into before some magistrate, to whom the presiding judge shall report it; but the party arrested shall first be permitted to vote, if entitled to do so unless he is drunk from the use of intoxicating liquor, then he shall not be permitted to vote until he is sober."

13. Articles 3003 to 3025 contain elaborate provisions for securing purity of the ballot box.

"PRIMARY ELECTION"

observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, any one engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

13. Article 3122 provides: "the same precautions required by law to secure the purity of the ballot box in general election; in regard to the ballot boxes, locking the

"GENERAL ELECTION"

14. Article 3028 requires delivery of sealed ballot boxes containing ballots, etc., to County Clerk after this election.
15. Article 3041 provides for contest of this election before district court.

"PRIMARY ELECTION"

ballot boxes, sealing the same, watchful care of the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections."

14. Article 3128 requires delivery of sealed ballot boxes containing ballots, etc., to County Clerk after this election.

APPENDIX D.
Constitution of the State of Texas.

ARTICLE VI.

SUFFRAGE.

Section 1. The following classes of persons shall not be allowed to vote in this State, to-wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

Fifth: All soldiers, marine and seamen, employed in the service of the Army or Navy of the United States. Provided that this restriction shall not apply to officers of the National Guard of Texas, the National Guard Reserve, the Officers Reserve Corps of the United States, nor to enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, nor to retired officers of the United States Army, Navy, and Marine Corps and retired warrant officers and retired enlisted men of the United States Army, Navy, and Marine Corps.

Section 2. Every person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years and who shall have resided in this State one year next preceding an election and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified elector; • • •

Section 3. All qualified electors of the State, as herein described, who shall have resided for six months immediately preceding an election, within the limits of any city or corporate town, shall have the right to vote for Mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred, shall be levied upon the persons debarred from voting in relation thereto.

Section 4. In all elections by the people the vote shall be ballot and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box and the Legislature may provide by law for the registration of all voters in all cities containing a population of ten thousand inhabitants or more.

Section 5. Voters shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

Texas Civil Statutes.

ARTICLE 2954. *Not qualified to vote.*

The following classes of persons shall not be allowed to vote in this State.

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.

4. All persons convicted of any felony, except those restored to full citizenship and right of suffrage, or pardoned.

5. All soldiers, marines and seamen employed in the service of the army or navy of the United States. Acts. 1st C. S. 1905, p. 520.

ARTICLE 2955. *Qualifications for voting.*

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided that any voter who is subject to pay a poll tax under the laws of this State or ordinances of any city or town in this State shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title. . . . The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections.

ARTICLE 2956. *Absentee voting.*

Any qualified elector, as defined by the laws of this State, who expects to be absent from the county of his or

her residence on the day of the election may vote subject to the following conditions, to wit: . . .

ARTICLE 2975. *Lists of voters.*

Before the first day of April every year, the county tax collector shall deliver to the board that is charged with the duty of furnishing election supplies, separate certified lists of the citizens in each precinct who have paid their poll tax or received their certificates of exemption, the names being arranged in alphabetical order, and to each name its appropriate number, as shown by the duplicates retained in his office, with a description of the voter as to his residence, his voting precinct, length of his residence in the State and county, his race, occupation and post-office address if not in a city of more than ten thousand inhabitants. If the county has any unorganized county or counties attached to it for judicial purposes, the tax collector shall also deliver to said board, before the first day of April of each year, as many certified lists of the electors resident in such unorganized county or counties, who have paid their poll tax or received the certificate of exemption as there are election precincts in his county; which lists shall be identical with those of poll tax payers in his own county, except that the voting precinct shall not be stated. The tax collector of any county containing a town or city of more than ten thousand inhabitants shall also furnish to said board, not less than four days prior to any primary or general election, supplemental lists in the form herein prescribed, of all poll tax paying voters who have, since paying their poll tax, removed to each voting precinct in each such city or town in the county from another county or in another precinct in the same county. Said board shall furnish each presiding judge of a precinct the certified list and supplemental list of the voters of his precinct at the time when he

furnishes other election supplies. Such certified lists of qualified voters shall be in the following form:

Voters in Election Precinct.

No. _____

Name _____

Precinct _____

Age _____

Length of residence in State _____

Length of residence in county _____

Occupation _____

Race _____

Length of residence in city and ward _____

Street and number of residence _____

Post-office address _____

ARTICLE 2978. *Official ballot.*

In all elections by the people, the vote shall be by official ballot, which shall be numbered, and elections so guarded and conducted as to detect fraud and preserve the purity of the ballot. No ballot shall be used in voting at any general, primary or special election held to elect public officers, select candidates for office, or determine questions submitted to a vote of the people, except the official ballot, unless otherwise authorized by law. At the top of the official ballot shall be printed in large letters the words "Official Ballot." It shall contain the printed names of all candidates whose nominations for an elective office have been duly made and properly certified. The names shall appear on the ballot under the head of the party that nominates

them, except as otherwise provided by this title. No name shall appear on the official ballot except that of a candidate who was actually nominated (either as a party nominee or as a non-jartisan or independent candidate) in accordance with the provisions of this title. The name of no candidate shall appear more than once upon the official ballot, except as a candidate for two or more offices permitted by the Constitution to be held by the same person. The name of no candidate of any political party that cast one hundred thousand votes or more at the last preceding general election shall be printed on any official ballot for a general election, unless nominated by primary election, on primary election day, except as herein otherwise provided.

ART. 2979. [2968] *Death or declination*.—If a nominee dies or declines his nomination, and the vacancy so created shall have been filled, and such facts shall have been duly certified in accordance with the provisions of this title, the Secretary of State or county judge, as the case may be, shall promptly notify the official board created by this law to furnish election supplies that such vacancy has occurred and the name of the new nominee shall then be printed upon the official ballot, if the ballots are not already printed. If such declination or death occurs after the ballots are printed, or due notice of the name of the new nominee is received after such printing, the official board charged with the duty of furnishing election supplies, shall prepare as many pasters bearing the name of the new nominee as there are official ballots, which shall be pasted over the name of the former nominee on the official ballot before the presiding judge of the precinct indorses his name on the ballot for identification. No paster shall be used except as herein authorized, and if otherwise used the names pasted shall not be counted. [Id. sec. 50.]

ART. 2980. [2969] *Form of ballot.*—All ballots shall be printed with black ink on clear white paper of uniform style and of sufficient thickness to prevent the marks thereon to be seen through the paper. The tickets of each political party shall be placed or printed on one ballot, arranged side by side in columns separated by a parallel rule. The space which shall contain the title of the office and the name of the candidate shall be of uniform style and type on said tickets. At the head of each ticket shall be printed the name of the party. When a party has not nominated a full ticket, the titles of those nominated shall be in position opposite the same office in a full ticket, and the titles of the officers shall be printed in the corresponding positions in spaces where no nominations have been made. In the blank columns and independent columns, the titles of the offices shall be printed in all blank spaces to correspond with a full ticket. When presidential electors are to be voted on, their names shall appear at the heads of their respective tickets. When Constitutional amendments or other propositions are to be voted on, the same shall appear once on each ballot in uniform style and type. [Id.]

ART. 2981. *How to mark ballot.*—When a voter desires to vote a ticket straight, he shall run a pencil or pen through all other tickets on the official ballot, making a distinct marked line through such ticket not intended to be voted; and when he shall desire to vote a mixed ticket he shall do so by running a line through the names of such candidates as he shall desire to vote against in the ticket he is voting, and by writing the name of the candidate for whom he desires to vote in the blank column and in the space provided for such office; same to be written with black ink or pencil, unless the names of the candidates for which he desires to vote appear on the ballot, in which event he shall leave the same not scratched. [Id. sec. 53.]

ART. 2984. [2973-4] *Ballots furnished*.—For each voting precinct, there shall be furnished one and a half times as many official ballots as there are qualified voters in the precinct, as shown by the list required to be furnished by the tax collector to precinct judges. The official ballots to be counted before delivery and sealed up and together with the instruction cards, with poll lists, tally sheets, distance markers, returning blanks and stationery, shall be delivered to the precinct judges, and the number of each indorsed on the package, and entered of record by the county clerk in the minutes of the commissioners court. In like manner, shall be sent the list of qualified voters for the precinct certified to by the collector. [Id. secs. 44 and 48.]

ART. 2985. [2975] *Voters provide form*.—If, from any cause, the official ballots furnished for an election precinct have been exhausted or not delivered to the precinct judges, the voters may provide their own ballot after the style of the official ballot described in this title. [Id. sec. 47.]

CHAPTER 7.—ARRANGEMENTS AND EXPENSES OF ELECTION

ART. 2986. [2976] *Voting Booths*.—Voting booths shall be furnished and used at elections at each voting precinct in towns or cities of ten thousand inhabitants or more. [Acts 1st C. S. 1905, p. 529, sec. 37.]

ART. 2987. [2977] *Booths and guard rails*.—There shall be one voting booth or place for every seventy citizens who reside in the voting precinct and who at the last general election paid their poll tax or obtained certificates of exemption from its payment, provided, the judges of the election may provide as many more booths and places as they deem necessary. Each polling place, whether pro-

vided with voting booths or not, shall be provided with a guard rail, so constructed and placed that only such persons as are inside of such guard rail can approach the ballot boxes or compartments, places or booths at which the voters are to prepare their votes, and that no person outside of the guard rail can approach nearer than six feet of the place where the voter prepares his ballot. The arrangement shall be such that neither the ballot boxes nor the voting booths nor the voters while preparing their ballots shall be hidden from view of those outside the guard rail, or from the judges, and yet the same shall be far enough removed and so arranged that the voter may conveniently prepare his ballot for voting in secrecy. Where voting booths are required they shall have three sides closed and the front side open, shall be twenty-two inches wide on the inside, thirty-two inches deep and six feet four inches high, contain a shelf for the convenience of the voter in preparing his ballot; and shall be so constructed with hinges that they can be folded up for storage when not in use. The voting booths shall be so arranged that there shall be no access to them through any doors, window or opening except through the front of the booth; and the same care shall be observed in precincts where there are no booths in protecting the voter from intrusion while he is preparing his ballot. [Id. secs. 38 and 41.]

ART. 2988. [2978] *Open to view*.—All booths and voting places shall be properly lighted. Every guard rail shall be provided with a place for entrance and exit. The arrangement of the polling place shall be such that the booths or places prepared for voting can only be reached by passing within the guard rail; and the booths, ballot boxes, election officers and every part of the polling place, except the inside of the booths, shall be in plain view of the election officers and persons outside the guard rail, among

whom may be one challenger for each political party and no more. [Id. sec. 40.]

ART. 2989. [2980] *When booth not required.*—When voting booths are not required, a guard rail shall be so placed that no one not authorized can approach nearer than six feet of the voter while he is preparing his ballot; and a shelf for writing shall be prepared for him, with black lead pencil, and so screened that no other person can see how he prepares his ballot. [Id. sec. 42.]

ART. 2990. [2981] *Ballot boxes marked.*—For each election precinct, there shall be provided four ballot boxes to be marked as follows: “Ballot box No. 1 for election precinct No. _____” (giving name and number of precinct); “Ballot box No. 2 for election precinct No. _____;” “Ballot box No. 3 for election precinct No. _____;” “Ballot box No. 4 for election precinct No. _____.” [Id. sec. 43.]

ART. 2991. [2982] *Ballot boxes.*—All ballot boxes shall be securely made of metal or wood, provided with a top, hinges, lock and key, and an opening shall be made at the top of each just large enough to receive a ballot when polled.

ART. 2992. [2983] *Board to provide supplies.*—The county judge, county clerk and sheriff shall constitute a board, a majority of whom may act, to provide the supplies necessary to hold and conduct the election, all of which shall be delivered to the presiding judges of the election by the sheriff or any constable of the county, when not called for and obtained in person by the precinct judges. Said board shall file with the commissioners court a written report of their action as to supplies furnished by the county, giving a detailed statement of the expenses incurred in procuring such supplies. [Id. secs. 38 and 39.]

ART. 2993. [2984] *Judge to procure.*—If, from any cause, ballot boxes, voting booths, guard rails or other election supplies have not been received by the presiding judge, he shall procure them, and they shall be paid for as other election supplies. If the certified list of qualified voters is not in his possession at least three days before the election, he shall send for and procure them. [Id. sec. 45.]

ART. 2994. [2986] *Collector's fees for poll taxes.*—The tax collector shall be paid fifteen cents for each poll tax receipt and certificate of exemption issued by him to be paid pro rata by the State and County in proportion to the amount of poll tax received by each, which amount shall include his compensation for administering oaths, furnishing lists of qualified voters in election precincts for use in all general and primary elections and primary convention when desired, and for all duties required of him under this title; provided, that collectors in counties having a population in excess of 25,000 as determined by Article 3880, shall receive only ten cents for each poll tax receipt and certificate of exemption issued by him. [Acts 1905, 1st C. S., p. 557, § 144; Acts 1930, 41st Leg., 4th C. S., p. 30, ch. 20, § 1.]

Section 10 of Acts 1930 is a repealing clause, and section 12 provides that if any provision is held invalid, the same shall not affect the remaining portions.

ART. 2995. [2987] *Sheriff's and constable's fees.*—The sheriff or any constable for serving copies of the order designating the bounds of election precincts, or the election judges, posting notices, and for serving all other writs or notices prescribed by this title, shall be paid the amounts allowed by law for serving civil process. For delivering election supplies to precinct judges, when they are not

obtained by such judges in person, the sheriff or constable shall be paid such amount as the commissioners court may allow, not to exceed two dollars for each election precinct. [Acts 1905, 1st C. S., p. 557, § 145.]

ART. 2996. [2988] *Expenses for election supplies.*—All expenses incurred in providing voting booths, stationery, official ballots, wooden or rubber stamps, tally sheets, polling lists, instruction cards, ballot boxes, envelopes, sealing wax and all other supplies required for conducting a general or special election shall be paid for by the county, except the cost of supplying booths for cities. All accounts for supplies furnished or services rendered shall first be approved by the commissioners court, except the accounts for voting booths for cities. [Id. sec. 147.]

ART. 2997. [2989-90] *Municipal elections.*—The expense of all city elections shall be paid by the city in which same are held. In all elections in incorporated cities, towns and villages, the mayor, the city clerk, or the governing body shall do and perform each act in other elections required to be done and performed respectively by the county judge, the county clerk, or the commissioners' court. [Id. sec. 45.]

ART. 3086. *Election day.*—An election for the election of a Senator from Texas to the Congress of the United States shall be held on the first Tuesday after the first Monday in November of every year immediately preceding the fourth day of March when the term of any United States Senator from the State of Texas to the Congress of the United States is to expire. At such election no person shall be qualified to vote for any candidate for United States Senator unless he is a qualified elector in any election held to elect members of the most numerous branch

of the Legislature of this State.. [Acts 1st C. S. 1913, p. 101.]

ART. 3087. *Vacancy.*—When any vacancy occurs in the representation of this State in the United States Senate, the Governor of this State shall within ten days issue writs of election to fill each vacancy, which election shall be held not less than sixty days nor more than ninety days after such vacancy occurs, provided, if the Congress or Senate is in session at the time of such vacancy or should convene before such election or before the result of the same can be officially ascertained under law, the Governor shall make temporary appointment of a suitable and qualified person to represent the State in the United States Senate, until the election and qualification of a Senator can be made. [Id.]

ART. 3088. *State laws apply.*—Every law regulating or in any manner governing elections or the holding of primaries in this State shall be held to apply to each election or nomination of a candidate for a United States Senator so long as they are not in conflict with the Constitution of the United States or of any law or statute enacted by the Congress of the United States regulating the election of United States Senators or the provisions of this law. The returns from any election held for United States Senator shall be made, the result ascertained and declared, a certificate of election issued, as provided for the election of representatives in Congress, by this title. [Id.]

ART. 3089. *Name on ballot.*—The name of no candidate for United States Senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless the said candidate has been duly nominated and selected as herein provided. [Id.]

ART. 3090. *Nomination at primary.*—Each party desiring to nominate a candidate for United States Senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidate at a general primary election to be held throughout the State on the fourth Saturday in July next preceding such election for United States Senator. [Id.]

ART. 3096. *Candidate not nominated.*—Any person who has not been defeated at the primary election preceding the general or special election for United States Senators, desiring to have his name appear upon the official ballot at any general election as a candidate for United States Senator who is not the nominee of any political party or political organization may do so only upon presenting a petition to the Secretary of State signed by at least ten per cent of the qualified voters in the State of Texas as measured by the total vote for Governor at the preceding general election. Said petition shall conform in every particular to the requirements of the laws of this State with reference to placing the name of any candidate, other than the nominee of any party upon the official ballot, but in no case shall the name of any person to be placed upon the official ballot at any general election as a candidate for United States Senator as the nominee of any party unless he has been nominated under the provisions of this law and has complied with every provision of the laws of this State with reference to the nomination of candidates for United States Senators. [Id.]

ART. 3101. *Nominated at primary.*—“On primary election day in 1926, and every two years thereafter, candidates for Governor and for all other State officers to be chosen by vote of the entire State, and candidates for Congress and all district officers to be chosen by the vote

of any district comprising more than one county, to be nominated by each organized political party that cast one hundred thousand votes or more at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party.

ART. 3102. *Date of primary.*—"The fourth Saturday in July 1926, and every two years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party at any primary election for any State or district office unless he has complied with every requirement of all laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any State or district office under this article, a second primary election shall be held by such political party, in the State or such districts, as the case may be, on the fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. Any political party may hold a second primary election on the fourth Saturday in August to

nominate candidates for any county or precinct office, where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same official ballot. Nominations of candidates at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations. All precincts in the same county and all counties in the same district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them."

ART. 3103. *Where to vote.*—"The places of holding primary elections of political parties in the various precincts of the State shall not be within one hundred yards of the place at which such elections or conventions are held by a different political party. When the chairmen of the executive committee of the different parties cannot agree on the places where precinct primary elections to be held on the same day shall be held, such places in each precinct shall be designated by the county judge, who shall cause public notice thereof to be given at once in some newspaper in the county, or if there be none, by posting notices in some public place in the precinct."

ART. 3104. *Officers of primary.*—"All the precinct primary elections of a party shall be conducted by a presiding judge, to be appointed by a chairman of the county executive committee of the party, with the assistance and ap-

proval of at least a majority of the members of the county executive committee. Such presiding judge shall select an associate judge and two clerks to assist in conducting the election; two supervisors may be chosen by any one-fourth of the party candidates, who, with the judges and clerks, shall take the oath required of such officers in general elections. Two additional clerks may be appointed, but only when, in the opinion of the presiding judge, there will be more than one hundred votes polled at the primary election in the precinct."

ART. 3105. *Judges of primary.*—"Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, any one engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

ART. 3107. *Political party may prescribe qualifications of members.*—"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that, no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

ART. 3108. *Expenses of primary.*—"At the meeting of the county executive committee provided in Article 3117, the county committee shall also carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks and messengers, to report the result in each precinct to the county chairman, as provided for herein, and all other necessary expenses of holding such primaries in such counties and shall apportion such cost among the various candidates for nomination for county and precinct offices only as herein defined, and offices only as herein defined, and offices to be filled by the votes of such county or precinct only (candidates for State offices excepted), in such manner as in their judgment is just and equitable, giving due consideration to the importance and emoluments of each such office for which a nomination is to be made and shall, by resolution, direct the chairman to immediately mail to each person whose name has been requested to be so apportioned to him, with the request that he pay the same to the county chairman on or before the Saturday the fourth Monday in June thereafter."

ART. 3109. *Ballot at primaries.*—"The vote at all general primaries shall be by official ballot, which shall have printed at the head the name of the party, and under such head the names of all candidates, those for each nomination being arranged in the order determined by the various committees as herein provided for, beneath the title of the office for which the nomination is sought. The voter shall erase or mark out all names he does not wish to vote for. The official ballot shall be printed in black ink upon white paper, and beneath the name of each candidates there-

of the State and district offices, there shall be printed the county of his residence. The official ballot shall be printed by the county committee in each county, which shall furnish to the presiding officer of the general primary for each voting precinct at least one and one-half times as many of such official ballots as there are poll taxes paid for such precinct, as shown by the tax collector's list where two or more candidates are to be nominated for the same office, to be voted for by the qualified voters of the same district, county or justice precinct, such candidate shall be voted for and nominations made separately, and all nominations shall be separately designated on the official ballots by numbering the same, "1", "2", "3", printing the word "No.," and the designating number after the title of the office for which such nominations are to be made. Each candidate for such nomination shall designate in the announcement of his candidacy, and in his request to have his name placed on official ballot, the number of the nomination for which he desires to become a candidate and the names of all candidates so requesting shall have their names printed beneath the title of the office and the number so designated. Each voter shall vote for only one candidate for each such nomination."

ART. 3120. Booths used for primary.—"The voting booths, ballot boxes and guard rails, prepared for a general election, may be used for the organized political party nominating by primary election that cast over one hundred thousand votes at the preceding general election."

ART. 3121. List of voters.—"The county tax collector shall deliver to the chairman of the county executive committee of each political party, for its use in primary elections, at least five days before election day, certified and supplemental list of the qualified voters of each precinct

in the county, arranged alphabetically and by precincts, and such chairman shall place the same for reference in the hands of the election officers of each election precinct before the polls are open. No primary election shall be legal, unless such list is obtained and used for reference during the election. Opposite the name of every voter on said list shall be stamped, when his vote is cast, with a rubber or wooden stamp, or written with pen and ink the words, "primary _____voted," with the date of such primary under the same for each list of all the qualified voters who have paid their poll taxes/or received their certificate or exemption, the collector shall be permitted to charge not more than five dollars, the same to be paid by the party or its chairman so ordering said list; provided, that the charge of five dollars shall be in full for the certified list of all the voters of the county arranged by precinct, as herein provided."

ART. 3124. *Returns of election.*—"Immediately upon the completion of the counting of the ballots, the precinct election judges shall prepare and make out triplicate returns of the same showing; (1) The total number of votes polled at such box; (2) The total number of votes cast at such box for each candidate, and the total number of votes polled at such box for or against any proposition voted upon. Such returns shall be signed and certified as correct by the judges and clerks of the election precinct. One copy of said returns shall be sealed up in an envelope and delivered by one of the precinct judges of election to the chairman of the county executive committee within twenty-four hours before the ballots shall have been counted; one copy of said returns shall be placed in one of the ballot boxes together with the ballots voted and shall be locked and sealed therein; the remaining copy of said returns shall be retained by the presiding judge of election for a period of

twelve months succeeding the date of election. The chairman of the county executive committee shall, upon receiving returns from each election precinct in the county order the members of the county executive committee to convene at the county seat of the county on the next succeeding day; provided, however, that if the returns of all precincts are not received by the county chairman before the first Friday succeeding the day of the primary election, the county executive committee shall meet on the first Saturday succeeding the day of the primary election, and the returns in the hands of the county chairman shall be opened by the executive committee in executive session and shall be canvassed by them. The county Attorney shall upon the relation of the county chairman immediately institute mandamus proceedings in the proper court to compel the delinquent returning officers to make returns as required by law, and it shall be the duty of the county chairman to notify the county attorney of the delinquency of the election officers immediately after the meeting of the county executive committee on the first Saturday next succeeding the day of the primary election."

ART 3128. *Box and ballots returned.*—"Ballot boxes after being used in primary elections shall be returned with the ballots cast, or contained in each box as they are deposited by the election judge, locked and sealed, to the county clerk, and, unless there be a contest for nomination in which fraud or illegality is charged, they shall be unlocked and unsealed by the county clerk and their contents destroyed by the county clerk and the county judge without examination of any ballot, at the expiration of sixty days after such primary election."

ART. 3129. *To publish nominees.*—"The county clerks shall cause the names of the candidates who have received

the necessary votes to nominate, as directed by the county executive committee, for each office, to be printed in some newspaper published in the county, and if none, then he shall post a list of such names in at least five public places in the county, one of which shall be upon the court house door."

ART. 3130. *Objections to nomination.*—"All objections to the regularity or validity of the nomination of any person, whose name appears in said list, shall be made within five days after such printing or posting, by a written notice filed with the county clerk, setting forth the grounds of objections. In case no such objection is filed within the time prescribed, the regularity or validity of the nomination of no person whose name is so printed or posted, shall be thereafter contested."

ART. 3131. *Name printed on ballot.*—"After said names have been so printed or posted for the period above required, the said clerk shall cause the names to be printed on the official ballot in the column for the ticket of that party."

ART. 3132. *To post names of candidates.*—"Each county clerk shall post in a conspicuous place in his office, for the inspection of the public, the names of all candidates that have been lawfully certified to him to be printed on the official ballot, for at least ten days after he orders the same to be printed on said ballot; and he shall order all the names of the candidates so certified printed on the official ballot as otherwise provided in this title."

ART. 3142. *Mandamus.*—"Any executive committee or committeeman or primary officer, or other person herein charged with any duty relative to the holding of the pri-

mary election, or the canvassing, determination or declaration of the result thereof, may be compelled by mandamus to perform the same in accordance with the provisions of this title."

ART. 3144. *Statement of expenses.*—"Within ten days after a final election, all candidates for office at such election shall file a written itemized statement, under oath, with the county judge of the county of their residence, of all the expenses incurred during the canvass for the office, and for the nomination, including amounts paid to newspapers, hotel and traveling expenses, and such statement shall be sworn to and filed, whether the candidate was elected or defeated, which shall at all times be subject to the inspection of the public."

ART. 3145. *Expenses of manager.*—"Every person who manages any political headquarters for any political party, or for any candidate before any election, and every clerk or agent of such manager for such headquarters or candidate, and every other person whomsoever who expends money, gives any property or thing of value, or promises to use influence, or give a future reward to promote or defeat the election of any candidate, or to promote or defeat the success of any political party at any election, shall, within ten days after such election, file with the county judge of the county in which the political headquarters was located, and with the county judge of the county where such manager, clerk, or other person, as the case may be, resides, an itemized statement of all moneys or things of value thus given or promised, for what purpose, by whom supplied, in what amount and how expended, and what regard was given or promised, by whom and to whom, and what influence was promised, by whom promised, and to whom said promise was given. He shall state

whether he has been informed, or has reason to believe, that the person thus aiding or attempting to defeat a party or candidate was an officer, stockholder, agent or employe of, or was acting for or in the interest of any corporation, giving his name, and, if so, what corporation; and he shall if he has no positive knowledge, state the source of his information or the reasons for his belief, as the case may be; all of which shall be sworn to and subscribed before the county judge, who shall file and preserve the same, which shall at all times be subject to the inspection of the public."

ART. 3157. *Nominations certified*.—"All nominations so made by a State or district convention shall be certified by the chairman of the State or district committee of such party to the Secretary of State, and a nomination made by a county convention, by the chairman of the county committee."

ART. 3158. *Illegal participation*.—"No person shall be allowed to participate in any such convention who has participated in the convention or primary of any other party held on the same day."

ART. 3160. *Oath to application*.—"To every citizen who signs such application, shall be administered the following oath, which shall be reduced to writing and attached to such application, viz: 'I know the contents of the foregoing application; I have participated in no primary election which has nominated a candidate for the office for which I (here insert the name) desire to be a candidate; I am a qualified voter at the next general election under the constitution and laws in force, and have signed the above application of my own free will.' One certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered."

Texas Penal Code.

ARTICLE 217. *Refusing to Permit Voter to Vote.*—Any judge of any election who shall refuse to receive the vote of any qualified elector who, when his vote is objected to shows by his own oath that he is entitled to vote, or who shall refuse to deliver an official ballot to one entitled to vote under the law, or who shall wilfully refuse to receive a ballot after one entitled to vote has legally folded and returned same, shall be fined not to exceed five hundred dollars.

ARTICLE 231. "*Election*" Defined.—The term "election" as used in this chapter, means any election, either general, special, or primary, held under authority of law within this State, or within any town, city, district, county, precinct, or any other subdivision within this State for any purpose whatever.

APPENDIX E.**Louisiana Statutes.**

La. Act No. 46, Regular Session, 1940:

Section 1. Be it enacted by the Legislature of Louisiana, that all political parties shall make all nominations of candidates for the United States Senate, Members of the House of Representatives in the Congress of the United States, all State, district, parochial and ward officers, Members of the Senate and House of Representatives of the State of Louisiana, and all city and ward officers in all cities containing more than five thousand population, by direct primary elections.

That any nomination by any political party of any person for any of the aforesaid mentioned offices by any other method shall be illegal, and the Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of this Act.

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Section 3. The term "political party," as used in this Act, is defined to be one that shall have cast at least five per centum of the entire vote cast in the last preceding gubernatorial election, or five per centum of the entire vote cast for presidential electors at the last preceding election, or at either of said elections.

Section 4. All primary elections held by political parties, as defined herein, must be conducted and held under, and in compliance with, the provisions of this Act.

(Section 5, provides that all political parties shall be directed by an organization of committees which are described and specified in detail. Among these committees is the Parish Committee for each parish in the state, which committee is to be "composed of as many ward members as there are police jurors provided for in such parish and five (5) members at large, all of which members shall be elected in the same manner as members of the State Central Committee; provided, however, that in the Parish of Orleans said parish committee shall consist of two (2) members from each ward in said parish.")

Section 15. The members of the Parish Executive Committee, as herein provided, shall be elected at the first primary election held in January, 1944, for the nomination of State and parish officers, and shall be elected every four years thereafter. . . .

Section 19. The State Central Committee, as now organized and created, and all other committees, as now organized and created, and all officers of the various committees heretofore created and now in existence, are hereby recognized and continued. All rules, regulations and requirements heretofore adopted by the State Central Committee or by any of the committees organized under Act 97 of the Legislature of Louisiana for the year 1922, as amended, not in conflict with or contrary to the provisions of this Act, are hereby recognized as legal and void, and shall continue in full force and effect until otherwise changed by the committees herein created, or authorized to be created. . . .

Section 27. The qualifications of voters and candidates in primary elections, held under this Act, shall be the same

as now required by the Constitution and election laws of this State for voters at general elections and the further qualifications prescribed by the State Central Committee of the respective political parties coming under the provisions of this Act.

Section 29. Only those who have so declared their political affiliation shall be permitted to become candidates or to vote in any primary election of any political party, as defined in this Act.

Section 30. Any person desiring to become a candidate in any primary election held under the provisions of this Act shall, within twenty days for State and District officers, and within ten days for parochial, municipal and ward officers, except as otherwise provided herein, from and after the issuance of the call of the said committee for the said primary election, file with the respective officers hereinafter designated, written notification of his intention to become a candidate at such primary, accompanied by a declaration, under oath, that to the best of his knowledge and belief he is a duly qualified elector under the Constitution and laws of this State; that he is a member of the party calling said primary election, and that he possess the qualifications required by the State Central Committee of such party.

Section 31 (a). Every candidate for nomination as United States Senator, member of Congress . . . shall file written notification and declaration of candidacy, as provided herein, with the Chairman of the committee calling the primary, and as evidence of their good faith, shall, at the time of filing such notice and declaration of candidacy, deposit with the Chairman of the committee calling the pri-

mary election, the sum of One Hundred and No/100 (\$100.00) dollars.

Section 35. The expense of primary elections held under this Act shall be apportioned and defrayed as follows:

(a) The expense of printing ballots and the furnishing of the necessary stationery and other election supplies for all primary elections held under the provisions of this Act, except as hereinafter otherwise provided, and also all expenses necessary to the transmission and promulgation of the returns, shall be paid by the State of Louisiana, in the same manner as for general elections.

(b) The necessary expenses incidental to the holding and conducting of the said primary elections, such as payment of commissioners of election, rent of polling places, expense of delivery of the ballot boxes and supplies to and from the polling places, shall be borne by the respective parishes, cities and towns, and the respective police juries, or municipal authorities shall provide, by ordinance, for their payment.

(c) Any other actual expenses necessary and incidental to the calling and holding of the said primary election shall be borne by the candidates participating therein.

(Sections 36-39 provide that the bollot in Congressional primaries shall be prepared by the Secretary of State and shall be printed according to a specified form. Section 38 provides:

"At the bottom of the ballot and after the name of the last candidate shall be printed the following, viz.: 'By.

casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.'

"Should any voter scratch out, deface or in any way mutilate or change the pledge printed on the ballot, he shall not be considered or held to have repudiated or to have refused to take the pledge, but shall, conclusively, be presumed and held to have scratched out, defaced or mutilated or changed same for the sole purpose of identifying his ballot; and accordingly such ballot shall be marked 'Spoiled Ballot' and shall not be counted.'")

(Sections 53-57 specify the location of the polling places and the hours during which they must be open.)

Section 58. No voter shall be allowed to take part in any primary who shall not have registered at least thirty (30) days prior to the date of the primary election held under this Act. Seven days prior to every primary election, the Registrar of Voters throughout the entire State shall make a complete list of all registered voters in every voting precinct in the parish registered as affiliated with the party holding the primary, certify to same, and at least five (5) days before the primary election deliver the same to the respective parish committees of the party or parties holding the said primary election, without any cost or charge whatsoever. The said list shall not contain the name of any elector not affiliated with the party holding the said primary election.

(Section 61 provides that primaries are to be conducted by five commissioners of election at each polling precinct, who shall be commissioned in each parish by the chair-

man or the vice-chairman of each parish committee. They are to possess "the same qualifications as are required of voters in the ward in which they shall reside." Their compensation is to be \$5. They are to be selected in this fashion: the "local" candidates in each parish in the state submit a given number of names of persons whom they desire to be commissioned, and the names of five of these persons are chosen by lot. (In Section 34, "local candidates" are defined as: "(a) candidates for membership in either house of the Legislature of Louisiana: (b) candidates for any parish, ward or municipal office, except those of Justice of the Peace or Constable.") This drawing of names is to be conducted by the parish committee.)

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER.

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Supreme Court of the United States

October Term, 1943

No. 51

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LONGIE E. SMITH,

Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge,
and JAMES E. LUIZZA, Associate
Election Judge, 48th Precinct of
Harris County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 593, as well as in the record filed in this cause (R. 150-151).

Jurisdiction.

The date of the judgment in this case is November 30, 1942 (R. 152). Petition for rehearing was filed within the time provided by the Rules of the Circuit Court of Appeals for the Fifth Circuit and was denied on January 21, 1943 (R. 160).

The jurisdiction of the Court is invoked under Section 240(2) of the Judicial Code (28 U. S. C. Sec. 347 (A)). Certiorari was granted June 7, 1943.¹

¹ 87 L. Ed. 1167.

Summary Statement of Matter Involved.

I.

Statement of the Case.

The amended complaint alleged that on July 27, 1940, and on August 24, 1940, the respondents, acting as election judges of the 48th Precinct of Harris County, Texas, denied the petitioner and other qualified electors the right to vote in the primaries for selection of candidates upon the Democratic ticket for the offices of United States Senator and Representatives in Congress. Petitioner sought damages for himself and a declaratory judgment on behalf of himself and others similarly situated that the actions of the respondents in refusing to permit qualified Negro electors to vote in these primaries violated Sections 31 and 43 of Title 8 of the United States Code in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article I, and the 14th, 15th and 17th Amendments of the United States Constitution (R. 4-16).¹ The amended answer admitted that respondents refused to permit petitioner to vote, but denied that their actions violated the United States Constitution or laws, because the Democratic primary in Texas was "a political party affair" and, therefore, not subject to federal control (R. 59-71). The parties agreed to stipulations as to certain material facts (R. 71-76).

The case was heard upon the stipulations (R. 71-76), depositions (R. 118-147), and oral testimony (R. 96-109). On May 11, 1942, District Judge T. M. KENNERLY filed Findings of Fact and Conclusions of Law (R. 80-85), and on May 30, 1942, entered a final judgment: (1) that the peti-

¹ Jurisdiction of the federal courts is invoked under Sections 41 (11), 41 (14) and 400 of Title 28 of the United States Code.

tioner "take nothing against" respondents, and (2) issued a declaratory judgment "that the practice of the defendants [respondents here] in enforcing and maintaining the policy, custom, and usage of which plaintiff [petitioner here] and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the 14th, 15th, or 17th Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).

II.

Salient Facts.

All parties to this action, both petitioner and respondents, are citizens of the United States and of the State of Texas, and are residents of and domiciled in said State (R. 71).

Petitioner is a Negro, native born citizen of the United States residing in Houston, Harris County, Texas, a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification (R. 71).

Petitioner is a believer in the tenets of the Democratic Party and, as found by the district judge, is a Democrat (R. 81). Petitioner has never voted for any other candidates than those of the Democratic Party in any general election at all times material to this case; has been and is ready and willing to take the pledge of persons voting in the Democratic Primary (R. 71, 81).

A primary and a "run off" primary were held in Harris County, Texas, on July 27, 1940 and August 24, 1940, for nomination of candidates upon the Democratic ticket for the

offices of United States Senator, U. S. Congressman, Governor and other State and local officers. Prior to this time the respondents were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas (R. 72, 81).

On July 27, 1940, petitioner with his poll tax receipt presented himself to vote in the said Democratic primary, at the regular polling place for the 48th Precinct and requested to be permitted to vote. Respondents refused him a ballot solely because of his race and color, in accordance with alleged instructions of the Democratic party of Texas (R. 73, 81).

The State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article 2955 of the Revised Civil Statutes of Texas. This statute prescribes identical qualifications for voting in both "primary" and "general" elections (R. 11, 12, 23).

Direct primary elections in Texas were created and are required and controlled in minute detail by an intricate statutory scheme.¹

According to the stipulations of facts made a part of the Findings of Facts of the District Court: "At all times material herein the only State-Wide Primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

¹ The present election laws of Texas originated with the so-called "Terrell Law", being "An Act to regulate elections and to prescribe penalties for its violation" (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82-107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C heretofore filed.

Sections of the Constitution of the State of Texas and Sections of the Texas Election statutes are set forth in Appendix D heretofore filed.

The Democratic Party in Texas.

The Democratic Party is the only party in Texas required by law to hold primary elections (R. 72). The Democratic Party in Texas is a voluntary association of individuals without any rules or procedure for becoming a member (R. 119). There is no constitution, nor are there by-laws or fixed rules for the Democratic Party (R. 133, 146). It is admittedly run in a "slipshod" manner (R. 146). There are no permanent records (R. 131). There are no fixed rules for the "government of the affairs of the Party" other than the election laws of the State of Texas (R. 133-134). The policy of the party is dictated by the conventions held every two years. There are no permanent officers of the party (R. 125). Officers of the convention are elected at each convention and their duties end at the adjournment of the convention (R. 146).

Every two years primary elections are held pursuant to the elections laws of the State of Texas (R. 131-132). In the holding of these elections the laws of Texas are followed (R. 131). There are no rules for holding these elections other than the election laws of Texas (R. 133-134). At these primary elections any white elector, regardless of party affiliation, is permitted to vote (R. 106, 81).

After the elections are held the successful candidates are certified to the Secretary of State of Texas (R. 128). This likewise is done pursuant to and by virtue of the election laws of Texas (R. 128).

Expenses of the Primary.

The County Clerk, the Tax Assessor and Collector, the County Judge of Harris County all performed their duties under Articles 3100-3153, Revised Civil Statutes of Texas,

in connection with holding of the primaries on July 27, 1940, and August 24, 1940, without cost to the candidates or the Democratic Party or any official thereof (R. 73).

After such primary the names of the candidates receiving the nomination were certified by the County Executive Committee, and the State Executive Committee, in turn, certified such nominees to the Secretary of State who placed the names of such candidates on the General Election Ballot to be voted on in the general election. All services rendered in this connection by the Secretary of State were paid for by the State of Texas (R. 74).

Although some of the expenses of the primary elections are paid by the Harris County Democratic Executive Committee, it is admitted: "... that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned prorata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied" (R. 76).

Errors Relied Upon.

The question presented by the Petition for Certiorari heretofore granted was:

"Does the Constitution of the United States prohibit the exclusion of qualified Negro electors from voting in primary elections which are an integral part of the election machinery of the State and which are determinative of the choice of Federal officers?"

The Circuit Court of Appeals erred in affirming the judgment of the trial court denying petitioner relief and

issuing a declaratory judgment "that the practice of the defendants [respondents here] in enforcing and maintaining the policy, custom and usage, of which plaintiff [petitioner here] and other Negro citizens are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the 14th, 15th, or 17th Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed for the following reasons:

I.

THE CONSTITUTION AND LAWS OF THE UNITED STATES AS CONSTRUED IN UNITED STATES V. CLASSIC PROHIBIT INTERFERENCE BY RESPONDENTS WITH PETITIONER'S RIGHT TO VOTE IN TEXAS DEMOCRATIC PRIMARIES.

- A. THE RATIONALE OF THE CLASSIC CASE COVERS A CIVIL ACTION FOR DENIAL OF THE RIGHT TO VOTE IN A LOUISIANA PRIMARY ELECTION BECAUSE OF RACE OR COLOR.
- B. THERE IS NO ESSENTIAL DIFFERENCE BETWEEN THE STATUS OF PRIMARY ELECTIONS IN LOUISIANA AND IN TEXAS.
 - (1) Texas like Louisiana has made primary elections "an integral part of the procedure of choice".
 - (2) In Texas as in Louisiana the Democratic primary in fact "effectively controls the choice" of Senators and Representatives.
- C. THE RESPONDENTS HERE ARE SUBJECT TO THE CONTROLLING FEDERAL STATUTES.

II.

THE ACTION OF RESPONDENTS HEREIN WAS IN VIOLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

- A. THE CONDUCT OF RESPONDENTS IN DENYING PETITIONER A BALLOT TO VOTE IN THE TEXAS DEMOCRATIC PRIMARY WAS STATE ACTION.
- B. NEW MATTER DISCLOSED IN THE PRESENT RECORD DESTROYS THE FACTUAL BASIS FOR THE DECISION IN GROVEY V. TOWNSEND.

ARGUMENT.

I.

The Constitution and laws of the United States as construed in *United States v. Classic* prohibit interference by respondents with petitioner's right to vote in Texas Democratic primaries.

In his complaint petitioner charged that respondents had violated Sections 31 and 43 of Title 8, United States Code, in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article 1 and the Seventeenth Amendment of the Constitution of the United States (R. 4-5).¹ The courts below held that the petitioner, a qualified elector of the State of Texas, could not maintain an action for damages against the respondents, Democratic primary election judges, who refused to permit petitioner

¹ Jurisdiction of the District Court was invoked under subdivisions 11 and 14 of Section 41 and Section 400 of Title 28 of the United States Code (R. 4-5).

and other qualified electors to vote in the Democratic primary elections held July 27, 1940, and August 24, 1940, in voting precinct 48, Harris County, Texas. These rulings are inconsistent with the decision of this Court in *United States v. Classic*.¹

A. The rationale of the *Classic* case applies to a civil action for denial of the right to vote because of race or color in a Louisiana primary election.

In *United States v. Classic*, *supra*, all of the Justices agreed that the right to vote in a direct primary election which the State has made an integral part of the procedure of choice among candidates for Congress or which in fact effectively controls such choice is secured by the Constitution as fully as is the right to vote in a general election.²

The majority of the Court then concluded that the criminal sanctions of Sections 19 and 20 of the Criminal Code in terms directed at "the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and the laws of the United States" were applicable to the deprivation of the right of a voter to have his ballot counted in such a primary election.

It necessarily follows that the defendants, *Classic*, and others, were likewise liable civilly to the complaining witness under Section 43 of Title 8 of the United States Code, which is part of the same original Act as Sections 19 and

¹ 313 U. S. 299 (1941).

² Compare statement by HOLMES, J., in *Nixon v. Herndon*, 273 U. S. 536, 540 (1927): "If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

20 of the Criminal Code and the language of which closely approximates the language of Section 20.¹

If the person seeking civil remedy has been debarred from participation in the primary because of race or color, he need not rely upon the general language of Section 43 alone because the act complained of is expressly prohibited by Section 31 of Title 8 of the United States Code, under the heading "Race, color or previous condition not to affect right to vote", which provides as follows:

- "All citizens of the United States who are otherwise qualified by law to vote at any election by the

¹ After the adoption of the 13th Amendment, a bill, which became the first Civil Rights Act (14 Stat. 27) was introduced, the major purpose of which was to secure to the recently freed Negroes all the civil rights secured to white men. The second Civil Rights legislation (16 Stat. 140; *id.* 433) was passed for the express purpose of enforcing the provisions of the 14th Amendment. The third Civil Rights Act, adopted April 20, 1871 (17 Stat. 13), reenacted the same provisions.

Section 43 of Title 8 and Section 52 of Title 18 (Section 20 of the Criminal Code) of the United States Code are both parts of the same original bill and although one provides for civil redress and the other for criminal redress, the language of the two sections is closely similar:

SEC. 43 OF TITLE 8

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

SEC. 20 OF CRIMINAL CODE

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both." (R. S. Sec. 5510, Mar. 4, 1909, c. 321, sec. 20, 35, Stat. 1092.)

people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S. sec. 2004."

The dissenting Justices in the *Classic* case were of opinion that Section 20 as a criminal statute should be given a restrictive construction which would exclude frauds in primary elections from the wrongs embraced by that section. However, the allowance of a civil remedy is not impeded by the special restrictive canons of construction which are peculiarly applicable to criminal statutes. Indeed, Section 43 of Title 8 has been used repeatedly to enforce the right of the citizen to vote without discrimination because of race or color.¹

This problem of statutory construction is obviated altogether by Section 31 of Title 8, *supra*, since it is directed at the very wrong now under consideration; namely, the denial of the right to vote at any election because of race or color.

Once a primary becomes an election within the purview of federal authority, Sections 31 and 43 of Title 8 provide the voter with a civil remedy calculated to protect his right to vote in such primary election without distinction because of race or color. It follows that if the present petitioner were a Negro citizen of Louisiana complaining of acts in that State identical with those which occurred in Texas, he would have a cause of action under the doctrine of this Court in *United States v. Classic*, *supra*.

¹ See *Myers v. Anderson*, 238 U. S. 368 (1915); *Lane v. Wilson*, 307 U. S. 268 (1939).

B. There is no essential difference between primary elections in Louisiana and in Texas.

A comparison of primary elections and primary election laws in Texas with primary elections and primary election laws in Louisiana, demonstrates that in Texas, as in Louisiana, "the state law has made the primary an integral part of the procedure of choice [and that] . . . in fact the primary effectively controls the choice".¹

1. Texas like Louisiana has made primary elections "an integral part of the procedure of choice".

In *United States v. Classic*, this Court decided that a direct primary election is subject to federal control under Article I "where the state law has made the primary an integral part of the procedure of choice".² The Court pointed out that these constitutional provisions do not cease to be applicable when a state "changes the mode of choice from a single step, a general election to two, the first of which is a choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election".³ In another formulation of the same principle the Court said "that the authority of Congress . . . includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress".⁴ To determine the applicability of the stated principle in the *Classic* case, this Court considered the statutes of Louisiana concerning direct primary elections. While the Court did not in terms indicate which statutory pro-

¹ *United States v. Classic*, 313 U. S. at p. 318.

² 313 U. S. at p. 318.

³ 313 U. S. at pp. 316-317.

⁴ 313 U. S. at p. 317.

visions were of greatest significance in establishing the primary as part of the procedure of choice, the opinion does specify the two decisive types of state action from which this consequence had resulted; namely, (1) "setting up machinery for the effective choice of party candidates"; and, (2) eliminating or seriously restricting "the candidacy at the general election of all those who are defeated at the primary".¹

Comparison of the Texas and Louisiana statutes demonstrates that the legislatures of both states have taken the same type of action.²

In Louisiana all political parties casting five per cent. or more of the total votes at the preceding elections are required to nominate by direct primary election (Louisiana Act No. 46, Regular Session, 1940, Sections 1 and 3). In Texas all political parties casting 100,000 or more votes at the last general election are required by statute to nominate by direct primary election. (Vernon's Revised Civil Statutes, Article 3101.) It is agreed by both parties that: "At all times material herein the only state-wide primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

Texas eliminates or restricts the candidacy of persons other than primary victors to a greater extent than does Louisiana. The Texas law provides restrictions equivalent to those in Louisiana.³ In addition the Texas law requires

¹ 313 U. S. at p. 311.

² See Comparative Tables of Louisiana and Texas election statutes in Petitioner's Appendices filed herein under separate cover.

³ Candidacy at the general election by means of independent nominating petition is restricted by the pledge required by statute of all persons participating in primary elections and the further statutory provision that persons participating in primary elections in which a candidate is chosen for office may not sign a petition in favor of another's nomination to said office (Article 3160).

that all party or organization candidates for Senator must be chosen at a primary election, and goes so far in making this restriction explicit as to preclude any candidates defeated in a senatorial primary from running as an independent or non-partisan candidate in the general election.¹

It is submitted that the foregoing are controlling factors sufficient in themselves to make a primary election an integral part of "the procedure of choice". Other statutory provisions may be relevant but they are not decisive. A large number of such subsidiary items appearing in both the Texas and Louisiana statutes are assembled for the purpose of comparison in parallel columns in Petitioner's Appendices. Only one of these cumulative circumstances appears in the Louisiana statutes but not in the Texas statutes. In Louisiana the State collects a fee from all candidates participating in primary elections and thereafter conducts the primary at its own expense, while in Texas, the statutes require the payment of certain prescribed fees by candidates to the Executive Committees of the Democratic Party to be used for the purpose of paying certain of the expenses of said primary.² In Texas many of the expenses of the primary are paid in their entirety and directly by the

¹ Vernon's Revised Civil Statutes of Texas, Arts. 3090, 3096.

² These funds contributed by candidates are considered a trust fund solely for the purpose of paying of certain expenses for the primary election and cannot either be appropriated by the Democratic party or used for any purpose other than those purposes specifically set out in the primary election statutes. *Kaufman et al. v. Parker*, 99 S. W. (2d) 1074 (1936); *Small v. Parker*, 119 S. W. (2d) 669 (1938).

state.¹ However, this factor, in the Texas scheme does not make the primary either more or less a part of the procedure of choice. It does not change the effectiveness of the primary in eliminating candidates, nor does it make primaries more or less mandatory or more or less completely defined by law. Thus tested by the criteria set up by this Court in the *Classic* case, this factor is in no sense controlling.

¹ Pursuant to Article 2975 of the Revised Statutes of Texas the County Collector of Taxes of Harris County, Texas, prepared a list of qualified voters of said county who paid their poll tax prior to January 31, 1940. Pursuant to Article 3121 of the Revised Statutes of Texas, the County Collector for Harris County, Texas, delivered a copy of this list to the defendants in their official capacities as Judges of Primary Elections, to be used by them in determining the qualifications of voters in said primary election. The expenses for the listing of qualified electors and the furnishing of these lists in the primary elections are paid for by the State of Texas and Harris County; pursuant to statute as follows:

"The tax collector shall be paid fifteen cents for each poll tax receipt and certificate of exemption issued by him to be paid *pro rata* by the State and County in proportion to the amount of poll tax received by each, which amount shall include his compensation for administering oaths, furnishing lists of qualified voters in election precincts for use in all general and primary elections and primary conventions where desired. . . ." (Article 2994.)

Pursuant to Article 3120 of the Revised Statutes of Texas, voting booths, ballot boxes, and guard rails prepared for general elections may be used for primary elections.

Pursuant to Article 2956 of the Revised Statutes of Texas, the County Clerk of Harris County, Texas, is authorized and required to receive absentee ballots for voting in the primary elections.

Pursuant to Article 3128 of the Revised Statutes of Texas, the County Clerk is required to cause the names of the candidates who have been nominated to be printed in some newspaper published in the County and to post a list of such names in at least five public places in the county, one of which shall be upon the courthouse door.

2. In Texas as in Louisiana the Democratic primary in fact "effectively controls the choice" of Senators and Representatives.

In *United States v. Classic*, *supra*, this Court decided that "where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary" is protected by the Constitution. In that case, an allegation that selection in the Democratic primary in Louisiana was decisive of election to Congress was admitted by demurrer to the indictment.

In the present case, it was alleged by the petitioner in his complaint and demonstrated by a summary of election statistics appended thereto that nominees of the Democratic Party have been elected in all major elections in Texas with but two exceptions since 1859 (R. 9, 29-59). Thereafter, by stipulation of the parties duly incorporated in the trial record, it was established as a fact that "since 1859 all Democratic nominees for Congress, Senate and Governor, have been elected in Texas, with two exceptions" (R. 72). In his trial findings the District Judge stated that "the facts in detail have been stipulated, but it seems only necessary to refer to the Stipulations and to make them a part thereof" (R. 81).¹

As a matter of fact, in 1940 when petitioner tried to vote the only opportunity for any Texas voter to exercise his choice for United States Senator was in the Democratic

¹ The full import of this is made clearer upon consideration of the fact that during this period two senators have been elected each six years, 21 members of United States House of Representatives have been elected every two years, and a governor elected every two years. The fact that during this period of more than eighty years there have only been two instances of election of candidates other than those of the Democratic Party demonstrates clearly that nomination at the Democratic primary in Texas is tantamount to election.

primary election. It was the only primary election held in 1940 (R. 72). The figures for the 1940 general election in Texas show the following vote for United States Senator: Democrat 978,095 and Republican 59,340.¹

The Texas Court of Civil Appeals has pointed out that it is "a matter of common knowledge in this state that a Democratic primary election, held in accordance with our statutes, is virtually decisive of the question as to who shall be elected at the general election".²

It is adequately established in this record that in Texas, as was the case in Louisiana, the Democratic primary in fact "effectively controls the choice". The legal consequence of this, under the *Classic* case, is that the right to vote in Texas primary elections is secured by the Constitution.

C. The respondents herein are subject to the controlling federal statutes.

Section 31 of Title 8 of the United States Code declares the federal right of otherwise qualified electors to vote at

¹ Congressional Directory (1943), p. 250.

² *State v. Meharg*, 287 S. W. 670, 672 (1926). One of the major reasons for the development of the primary election was that in "the South, where nomination by the dominant party meant election, it was obvious that the will of the electorate would not be expressed at all, unless it was expressed at the primary". CHARLES EVANS HUGHES, *The Fate of the Direct Primary*, 10 National Municipal Review, 23, 24. See also: HASBROUCK, *Party Government in the House of Representatives* (1927), 172, 176, 177; MERRIAM and OVERACKER, *Primary Elections* (1928), 267-269.

On the great decrease in the vote cast in the general election from that cast at the primary in the "one-party" areas of the country, see GEORGE C. STONEY, *Suffrage in the South*, 29 Survey Graphic 163, 164 (1940). In Louisiana there were 540,370 ballots cast in the 1936 Congressional primaries, as against 329,685 in the general election. In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

all elections without distinction of race or color.¹ It is admitted that respondents prevented petitioner from voting because of his race and color. Sub-division 11 of Section 41 of Title 28 of the United States Code² gives the District Court jurisdiction of all suits to enforce rights of citizens of the United States to vote in the several states.³ Similarly Section 400 of Title 28 conferring jurisdiction over proceedings for a declaratory judgment contains no limitation significant for present purposes as to the person against whom such proceedings may be brought. Thus it is necessary only that the petitioner show that the respondents are persons who have in fact infringed the right which he asserts, and it is not necessary that he shows that respondents acted under color of any state law.

It is only under Section 43 of Title 8 and under Sub-division 14 of Section 41 of Title 28 that a question arises whether the respondents acted "under color of any statute, ordinance, regulation, custom, or usage of any state". The

¹ See: *Guinn v. United States*, 238 U. S. 347 (1915); *Myers v. Anderson* (*supra*); *Nixon v. Herndon*; 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932).

² "The district courts shall have original jurisdiction. . . .

"Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States."

³ Section 31 of Title 8 is codified from Section 1 of the Act of May 31, 1870 (16 Stat. 140) which was amended by the Act of February 28, 1871 (16 Stat. 433). Section 15 of this amended statute provided that the Circuit Courts of the United States should have jurisdiction of all cases in law and equity arising under the original and amended acts. By Act of March 7, 1911 (36 Stat. 1092) the jurisdiction over these actions was transferred to the District Courts of the United States. This section has now become Section 41 (11) of Title 28 of the United States Code.

facts show that they did so act. It is the State of Texas which, by its election laws, creates, requires, regulates and controls the direct primary election as an integral part of the election machinery in that state. It is the statutes of Texas which require the appointment of primary election judges and prescribe the qualifications and disqualifications for such office, which are the same as the qualifications and disqualifications for judges of general elections. (Vernon's Revised Statutes, Articles 3104, 2930, 2940.) The statutes of Texas prescribe in minute detail the powers of primary election judges, which are likewise the same as those of general election judges. Specifically, respondents as such primary election judges were under statutory mandate to administer oaths, to preserve order, and to appoint special officers to assist in the maintenance of order (Art. 3105). They were required to compel the observance of the law prohibiting loitering and electioneering near the polling places and to arrest any person engaged in conveying voters to the polls in carriages or other conveyances except as permitted by statute (Art. 3105). All of these significant police powers of the respondents as election judges are derived solely from and exercised under the sovereign authority of the State of Texas. It is particularly significant that respondents as election judges are required by Article 3104 of the Revised Civil Statutes of Texas to take an oath which is the same oath that is required of officials serving in general elections and, moreover, Articles 217 and 231 of the Penal Code of the State of Texas make it a criminal offense subject to fine for any election judge to refuse to deliver a ballot to or receive the vote of a qualified elector in a primary election.

It is the usual procedure in Harris County, Texas, for the same individuals who are appointed election judges in the general elections also to serve as election judges in

the Democratic primary elections (R. 74). The respondents conducted the Democratic primary elections of 1940 in the same manner as the general elections and in conformance with the statutes of the State of Texas (R. 74, 103-108).

With their offices thus created and defined by the State and with their duty to receive and count ballots imposed by statute, respondents so exercised their official function under the laws of Texas as to deny petitioner the right to vote. Thus the action of which petitioner complains comes squarely within the test of action under color of state law as formulated in *United States v. Classic*: "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law".¹ Respondents "possessed" their "power . . . by virtue of state law" and their rejection of the petitioner's ballot was "made possible only because [they were] clothed with the authority of state law". Controlling effect should be given here as in the *Classic* case, to the relationship of the State to the enterprise in which the primary election judges were engaged. Once the state's relationship to the enterprise in which the offending persons are engaged is established, it is immaterial what sanction, if any, is claimed for a particular act done in performing an official function. Indeed,

¹ 313 U. S. at 326.

Cf. *Ex Parte Virginia*, 100 U. S. 339, 346 (1879); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278 (1913); *Hague v. Committee for Industrial Organization*, 307 U. S. 469, 507, 519 (1939).

if the matter of such sanction were controlling, the Court would necessarily have concluded in the *Classic* case that the alleged election frauds were not "under color of" state law because they were not authorized by the State.¹

It is submitted that this reasoning should have been but was not adopted when the status of Texas primary elections was considered by this Court in *Grove v. Townsend*.² In that case, the conduct of election judges was considered to be private rather than State action because the act complained of—the exclusion of Negroes from voting—was not authorized by the State. Under the correct approach of the *Classic* case, authority for the particular act is immaterial so long as the relationship of the State to the enterprise in which the election judges are engaged is such as to bring their whole course of official conduct "under color of state law". This conflict between the theories of *United States v. Classic* and *Grove v. Townsend* should now be resolved in accordance with the sound reasoning of the *Classic* case.

¹ In an unbroken line of decisions this Court has held that an officer of a state finds no shield from enforcement of federal constitutional and statutory limitations in the fact that the state law did not authorize the acts complained of. Even prohibition of misconduct by state statute does not operate to limit the federal authority to enforce constitutional restrictions as against state officers. See: *Raymond v. Chicago Traction Co.*, 207 U. S. 20 (1907); *Siler v. Louisville and Nashville R. R.*, 213 U. S. 175 (1909); *Des Moines v. Des Moines City Ry.*, 214 U. S. 179 (1909); *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U. S. 278 (1913); *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239 (1931). These cases must be taken as overruling the earlier and inconsistent *Barney v. City of New York*, 193 U. S. 430 (1904).

² 295 U. S. 45 (1935).

II.

The action of respondents herein was in violation of the Fourteenth and Fifteenth Amendments.

The refusal of the respondents to permit petitioner to vote in the Democratic primary in Texas because of race or color also violated the Fourteenth and Fifteenth Amendments to the Constitution of the United States. In the State of Texas, where the state law has made the primary an integral part of the procedure of choice and where in fact the primary effectively controls the choice, the prohibitions of the Fourteenth and Fifteenth Amendments apply to primary elections to the same extent as in the case of general elections.

A. The conduct of respondents in denying petitioner a ballot to vote in the Texas Democratic primary was state action.

In the *Classic* case this Court indicated that in primaries which are an integral part of the election machinery of a state the protection afforded by the Fourteenth Amendment to Negro voters is even clearer than the more generalized protection of Article I. Interpreting Section 19 of the Criminal Code the Court stated: "It does not avail to attempt to distinguish the protection afforded by Sec. 1 of the Civil Rights Act of 1871, 8 U. S. C. A. Sec. 43, to the right to participate in primary as well as general elections, secured to all citizens by the Constitution, . . . on the ground that in those cases the injured citizens were Negroes whose rights were clearly protected by the Fourteenth Amendment".¹

¹ 313 U. S. at p. 323.

The action of the respondents herein in refusing petitioner a ballot to vote in the Texas Democratic primary was "state action" within the meaning of the Fourteenth and Fifteenth Amendments to the same extent that the action of the defendants in the *Classic* case was "under color of" state law within the meaning of Section 20 of the United States Code. In the *Classic* case this Court after finding that the Democratic primary in Louisiana was "an integral part of the election machinery" of that state concluded that the election officials who refused to count the ballots of qualified electors in the primary elections were rightfully charged with violation not only of Section 19 of the Criminal Code, prohibiting such action by private individuals, but also Section 20, prohibiting such action by persons acting "under color of" state law. This conclusion was reached by applying the principle that: "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action 'under color of' state law".¹ It has been established in preceding sections of this brief that there is no essential difference between the legal character of the primaries in Louisiana and Texas and that respondent election judges acted "under color of" state law just as did the Louisiana election judges in the *Classic* case (pp. 12-21). Where conduct of the individual is so related to the state as to be "under color of" state law it necessarily follows that such conduct is likewise state action within the meaning of the Fourteenth and Fifteenth Amendments.²

The District Court conceded that the right to vote in a primary election which is "by law made an integral part of the election machinery" would be a right protected by the

¹ 313 U. S. 299, 326.

² Cf. *Ex parte Virginia*, *supra*; *Home Telephone & Telegraph Co. v. Los Angeles*, *supra*; *Hague v. Committee for Industrial Organization*, *supra*.

Federal Constitution. The District Judge, however, considered the decision of this Court in *Grovey v. Townsend* as controlling and that he must therefore "follow *Grovey v. Townsend* and render judgment for defendants" (R. 85). The United States Circuit Court of Appeals also considered the decision in *Grovey v. Townsend* as controlling and concluded that "we may not overrule it. On its authority the judgment is affirmed" (R. 151).

In thus following the *Grovey* case rather than the *Classic* case, the District Court and the Circuit Court of Appeals made a choice between inconsistent methods of determining whether conduct in primary elections is public or private action. It is respectfully submitted that the *ratio decidendi* of the *Classic* case rather than of the *Grovey* case should be followed.

B. New matter disclosed in the present record destroys the factual basis for the decision in *Grovey v. Townsend*.

The record before this Court in *Grovey v. Townsend*, *supra*, failed to reveal or present facts essential to an adequate legal appraisal of the so-called "white primary." That decision had no proper basis in the actualities of the Texas system, and should be re-examined in the light of facts now revealed for the first time in the present record.

In *Grovey v. Townsend*, *supra*, this Court decided that the method of excluding Negroes from voting in the Texas Democratic primary elections did not involve such state action as is comprehended by the 14th and 15th Amendments. Because the exclusionary practice was predicated upon a resolution of the State Democratic Convention, and in the light of the record then at hand, this Court failed to find any decisive interposition of state force in the primary election.

Grove v. Townsend, supra, was decided upon demurrer to a petition for damages filed in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. That record provided no factual picture of the organization and operation of the so-called Democratic Party of Texas and permitted the assumption that the party had the basic structure and defined membership which are characteristic of an organized voluntary association. Moreover, on that record, this Court assumed that the privilege of voting in the Democratic primary election was an incident of party membership and restricted to members of an organized voluntary association called the "Democratic Party."¹ The present record and the following analysis will show that these supposed facts, vital to the decision in *Grove v. Townsend, supra*, did not exist.

The problem in *Grove v. Townsend, supra*, as in the present case, was the determination and evaluation of the participation of government on the one hand, and the so-called "Democratic party" on the other hand, in Texas primary elections with a view to deciding whether the conduct of these elections was, in legal contemplation, a governmental function subject to the restraints of the 14th and 15th Amendments or a private enterprise not so restricted. The complaint described in detail the state statutes creating, requiring, regulating, and controlling the conduct of primary elections in Texas. These circumstances were summarized in the opinion of this Court (295 U. S. 45, 49-50).

¹ "While it is true that Texas has by its laws elaborately provided for the expression of party preferences as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary . . ." (295 U. S. 45, 50).

In contrast, the nature, organization and functioning of the Democratic Party were nowhere adequately described. Instead, the Court found it necessary to rely upon a general conclusion of the Supreme Court of Texas in *Bell v. Hill*,¹ that the Democratic Party of Texas is a voluntary association for political purposes, functioning as such in determining its membership and in controlling the privilege of voting in its primaries.²

This Court was not bound to accept the conclusion of the Supreme Court of Texas as to the legal character of the primary election and the Democratic Party in Texas; for it is well settled that where the claim of a constitutional right is involved, this Court will review the record and find the facts independently of the state court.³ This Court should

¹ 123 Tex. 531, 74 S. W. (2d) 113 (1934).

² *Bell v. Hill* was decided by the Supreme Court of Texas on an original motion for leave to file a petition for mandamus. As in the *Grovey* case there were no facts presented or evidence of either the "Democratic Party" or the actual functioning of the election machinery.

³ In *Powell v. Alabama*, 287 U. S. 45 (1932), the Court decided for itself what duties counsel performed, in considering the question of adequate representation by counsel appointed by the state court. In *Cantwell v. Connecticut*, 310 U. S. 296 (1940), the Court made independent findings of fact as to the character of phonograph records played by Jehovah's Witnesses. In *Norris v. Alabama*, 294 U. S. 587 (1935), the Court weighed evidence showing that Negroes had been excluded from jury service by reason of race prejudice, against evidence that they had been excluded for other reasons, and held that the former outweighed the latter.

Accord: *Avery v. Alabama*, 308 U. S. 444 (1940).

In *Smith v. Texas*, 311 U. S. 128, at p. 130 (1940), this Court said:

"But both the trial court and the Texas Criminal Court of Appeals were of opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motion to quash the indictment. But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to appraise the evidence as it relates to this constitutional right." (Italics supplied.)

Accord: *Ward v. Texas*, 316 U. S. 547 (1942).

have reserved to itself the right to pass upon the mixed question of law and fact involved in the decision whether the conduct of primary election officials in Texas constituted state action.¹

Now, for the first time this Court has significant facts before it which permit an independent examination of the "party" and its functioning and a meaningful comparison of the roles of state and party in Texas primary elections. The present record shows that in Texas the Democratic primary is not, as was assumed in *Grovey v. Townsend*, *supra*, an election at which the members of an organized voluntary political association choose their candidates for public office.

¹ In *Pierre v. Louisiana*, 306 U. S. 354, at p. 358 (1939), the Court said:

"In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

In *Norris v. Alabama*, 294 U. S. 587, at p. 590 (1935), Mr. Chief Justice HUGHES, in his opinion for the unanimous Court, said:

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

Accord: *Great Northern Railway v. Washington*, 300 U. S. 154 (1937), *United Gas Co. v. Texas*, 303 U. S. 123 (1937), *Cf. Mason Co. v. Tax Commission*, 302 U. S. 186 (1937).

First, any *white* elector, whether he considers himself Democrat, Republican, Communist, Socialist, or non-partisan, may vote in the "Democratic" primary. The testimony of the respondent Allwright is positive on this point.

"Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.

Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.

Q. And Negroes are not permitted to vote in the primary election? A. They don't vote in the primary.

Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.

Q. And you do let them vote? A. Yes" (R. 106).

Second, the Democratic party of Texas has no identified membership and no structure which would make its membership determinable. Under these circumstances, it is impossible to restrict voting in the primary election to "party members." The testimony of E. B. Germany, Chairman of the Democratic State Executive Committee, illustrates this point (R. 119).

Third, the Democratic party of Texas is not organized. Officials claiming to represent the party testified positively that the party has no constitution nor by-laws (R. 146), and is a "loose jointed organization" (R. 126). No minutes or records of the periodic party conventions are preserved (R. 131). The party has no officers between conventions

(R. 125, 143). Beyond the lack of organic party law, there is no formulated body of party doctrine. No resolutions of the state conventions are preserved (R. 137). Even the resolution upon which the exclusion of Negroes from the primaries is predicated is not a matter of record and has no existence as a document (R. 136). At the trial, the alleged contents of the resolution were proved, over the objection of the petitioner, by the recollection of a witness who testified that he had introduced such a resolution, and was present when it was adopted (R. 138).

The only rules and regulations governing the Democratic Party and the Democratic primary elections are the election laws of the State of Texas (R. 133-134). This startling state of affairs is perhaps the most striking evidence of a one-party political system where for all practical purposes the Democratic Party is co-extensive with the body politic and, hence, needs no private organization to distinguish it from other parties.

In such circumstances the legal character of the primary elections, and the status of those who conduct them, can be derived only from the one organized agency, which creates, requires, regulates and controls these elections, namely, the State of Texas. The factual material supplied in this record, but not available in the record of *Grovey v. Townsend*, *supra*, compels this conclusion. Inadequately informed, this Court sanctioned the practical disenfranchisement of 540,565 adult Negro citizens, 11.88% of all adult citizens of Texas.¹ *Grovey v. Townsend* should be overruled.

¹ United States Census (1940). (Figures include native born and naturalized adult citizens.)

Conclusion.

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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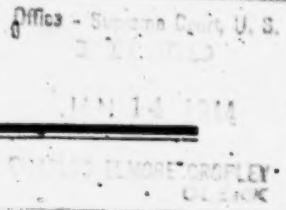
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FILE COPY



IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH

Petitioner

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA,
Associate Election Judge, 48th Precinct of
Harris County, Texas

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Authority for Filing

By permission of this Court granted in open court on January 12, 1944, petitioner files this reply brief addressed to the arguments submitted in this cause by the Attorney General of Texas.

ARGUMENT

I

Petitioner's Right to Relief Under Section 31 of Title 8 Remains Unchallenged

Petitioner, in this case asserts three distinct statutory bases for relief, viz.: First, the remedy provided by section 41 (11) of Title 28 of the United States Code for violation of section 31 of Title 8; second, the remedy provided by section 41 (14) of Title 28 for violation of section 43 of Title 8, and third, the remedy of declaratory judgment provided by section 400 of Title 28 for violation of either section 31 or section 43 of Title 8.

The right to recover under section 31 of Title 8 does not depend on whether or not respondents were state officers or were acting under color of state law. This question can only be material in considering the applicability of section 43 of Title 8. The brief *amicus curiae* filed herein by the Attorney General of Texas is addressed to the question whether or not respondents were state officers¹ and makes no mention of petitioner's claim to recovery under section 31 of Title 8.

Section 31 of Title 8² is directed at the denial of the right to vote at any election because of race or color, and the official position of the individual interfering with this right is immaterial. Section 31 declares the federal right of otherwise qualified electors to vote at all elections without distinction of race or color and subdivision 11 of section 41 of Title 28 gives the District Courts jurisdiction "of all

¹ See Brief of Attorney General of Texas, p. 2.

² "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S. sec. 2004."

suits . . . to enforce the right of citizens of the United States to vote in the several States".³

Although section 31 does not contain specific provision for remedy for violations of the rights therein declared, there can be no doubt that section 31 in conjunction with section 41 (11) of Title 28 provides sufficient basis for recovery in the present case. In an opinion delivered by Mr. Chief Justice Hughes in a case involving the applicability of certain sections of the Railway Labor Act,⁴ it was stated:

"The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. *Many rights are enforced for which no statutory penalties are provided.* In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each . . . The right is created and the remedy exists."⁵ (Italics ours.)

The necessity for and propriety of such statutory construction has most recently been affirmed by this Court in the case of *Switchmen's Union of North America v. National Mediation Board*⁶ in the following language:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those Courts to control . . ."

³ See petitioner's principal brief, pp. 11, 17-18.

⁴ *Texas and New Orleans R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930).

⁵ 281 U. S. 548, at p. 569.

⁶ 64 S. Ct. 95 (1943).

II

The Attorney General's Approach to and Analysis of the Status of Election Judges Are Unsound

The Attorney General of Texas contends that primary election judges in Texas are not "state officers". In support of this contention he cites *Ex parte Anderson*,⁷ holding that the chairmanship of a Democratic County Committee is not "an office of profit and trust within the contemplation of the laws" of Texas prohibiting the simultaneous holding of two such offices. The Attorney General also cites *Walker v. Mobley*,⁸ holding that the statutory disqualification of any person "who holds an office of profit or trust under . . . this state" does not prevent the chairman of a Democratic County Committee from serving as an election judge. Finally, he relies upon *Walker v. Hopping*,⁹ holding that a state constitutional provision that "all officers within this state" continue in office until their successors shall be duly qualified, does not apply to members of a Democratic County Committee.

These cases merely highlight the fallacy of testing the present issue, whether the United States Constitution restricts the official conduct of primary election judges, by analogy to cases controlled by considerations not material here. The policies which dictate the rule against holding two profitable state offices simultaneously or against a member of the administration in power judging an election have no bearing on the present issues. It is not particular local incidents of the office of election judge but the basic relationship of the state to the enterprise in which the election judge is engaged which is controlling here. As Mr. Justice Cardozo said in *Nixon v. Condon*:¹⁰

⁷ 51 Tex. Cr. Rep. 239, 102 S. W. 727 (1907).

⁸ 101 Tex. 28, 103 S. W. 490 (1907).

⁹ 226 S. W. 146 (Tex. Civ. App. (1920)).

¹⁰ 286 U. S. 73, 89 (1932).

"The test is not whether the members of the Executive Committee are representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action".

Indeed, the Attorney General's argument would necessarily challenge the soundness of this Court's decision in *Nixon v. Condon*. For his contention, consistently applied, would lead to the conclusion that members of the State Democratic Executive Committee in that case should not have been considered as "acting under color of state law" and subject to the restraints of the 14th and 15th Amendments when they excluded Negroes from participating in Democratic primaries.

The only sound test of the status of the officials in question for the purpose of determining whether restrictions of the Federal Constitution apply to their official conduct is that stated in *United States v. Classic*:¹¹ "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law." The analysis of the relationship of the State to Texas direct primary elections and the judges who conduct them, as set forth in pages 19 to 25, inclusive, of petitioner's principal brief, contrasted with the absence of any offsetting control by the party makes clear the applicability of this test to the official conduct of respondent primary election judges.

¹¹ 313 U. S. 299, 326 (1941).

III

A Qualified Negro Elector Cannot Be Denied a Primary Ballot on Any Theory That the Integrity of the Democratic Party Is Thereby Destroyed

The Attorney General of Texas has sought to establish that under Texas law and polity a political party has inherent power to determine its own membership and that this case involves no more than the exercise of such power by the Democratic party of Texas.

In the petitioner's view of the case this entire argument is beside the point. Petitioner asserts a right to participate in the choice of Senators and Representatives in Congress founded upon and guaranteed by Article I and the 17th Amendment of the Constitution of the United States. He asserts further that his privilege of voting as guaranteed by the 15th Amendment of the Constitution has been abridged. It follows from the decision of this court in *United States v. Classic, supra*, that an elector's constitutional right to vote for and to participate in the choice of federal officers extends to voting in primary elections which a state has made an integral part of its machinery of choice, or which in fact are decisive of the choice. Petitioner's principal brief has demonstrated that the primary elections in which he sought to vote are within these categories as set up in *United States v. Classic*.

Under such circumstances the abridgement of constitutional privilege is established and the claim of inherent power to do the acts which have resulted in such abridgement can be of no legal significance. Whatever power local law or local political theory may confer upon a political party with reference to the determination of its membership, that power cannot be exercised in such manner as to infringe the constitutional privilege of voting for federal officers.

In this connection it is important to note that although

the 15th Amendment prevents the abridgement of petitioner's right to vote because of color, and Article I and the 17th Amendment protect his right to participate in the choice of Senators and Representatives, this does not necessarily preclude the application of local rules of allegiance to party political tenets or a pledge to support party candidates. A requirement of adherence to the party's political faith may be reasonable and proper and compliance is within the power of the elector. Thus there is nothing inconsistent between preventing the exclusion of qualified electors from primary voting because of color and at the same time permitting a locally imposed requirement that the elector make manifestation of allegiance to party principles.

A. Under Texas Polity, the Choice of the Elector Determines His Party Affiliation

Although the conclusions of the Attorney General of Texas concerning the nature of political parties and their inherent powers in Texas, if correct, would in no sense be decisive of the issues in this case, his conclusions are incorrect and his analysis of Texas statutes and decisions is faulty and incomplete.

It is the essence of the Attorney General's argument that unless political parties have inherent power of defining membership the party system can have no meaning. At the outset it should be pointed out that one of the fundamental facts in this case is that for all practical purposes there is only one political party in Texas and that the significant and decisive political contests occur within the Democratic party and not between or among two or more different parties.

However, there is in fact and in law, as recognized by the Texas courts, a workable method of defining the party status of the individual elector, a method adequate to serve the realities of the political situation in Texas. The party convention drafts and publishes the party platform. The his-

torical behaviour of party leaders and public officers elected on the party ticket have demonstrated the basic political principles to which the party adheres. The elector by reason of such history, or because of the party platform, or in the light of tradition, or for any other reason satisfactory to him, determines to support the Democratic ticket. He openly declares his allegiance by subscribing to the statutory pledge on the primary ballot. He affirms that he will support party candidates. By these tokens he considers himself a Democrat. It is the genius of Texas political organization, further attested by the absence of membership rolls or similar organizational devices within the party, that it is the choice of the elector rather than any action of the "party" which determines who is a Democrat. It was this conception of political status which enabled the District Judge in his trial findings in this case to find as a fact that petitioner "is a Democrat" (R. 81).

The clearest judicial exposition of this view that in Texas the voter chooses his party in accordance with his political beliefs rather than the party delimiting participation in primary elections upon some other basis appears in *Briscoe v. Boyle*.¹² There the Court said: "If (the qualified elector) considers himself a member of the party holding the election, and if he has a present intention to vote for the nominees selected at such election, he is entitled to vote therein, and by doing so he obligates himself to support such nominees at the resulting general election."¹³

The whole course of legislative and judicial action in Texas, except with reference to voting by Negroes, is consistent with this analysis. In *Love v. Wilcox*,¹⁴ the Supreme Court of Texas has traced the history of legislation concerning primary voting. The Court there pointed out that

¹² 286 S. W. 275 (Tex. Civ. App. 1926). This decision of the Texas Court of Civil Appeals was subsequently cited and discussed with approval by the Supreme Court of Texas in the leading case of *Love v. Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (1930).

¹³ At page 276.

¹⁴ Supra note 13.

the Democratic party platform of 1905 and the message to the Legislature from the Governor elected upon that platform both stressed the importance of uniform legislation to determine eligibility for voting in primary elections. It was pointed out further that in the ensuing debate the Legislature considered various restrictions and finally enacted a statute imposing the single uniform pledge of party loyalty, which is now incorporated in Article 3110 of the Texas Revised Civil Statutes. The Court then reviewed with approval several earlier decisions and concluded that the party can impose no new test of loyalty upon and can require no additional pledge of a qualified elector who seeks to vote in the party primary.

It is only where the Negro elector seeks to vote that there is any contrary legislation or adjudication. Such inconsistent rulings are made boldly and obviously. In *Briscoe v. Boyle*, *supra*, the Court of Civil Appeals in San Antonio clearly declared that a party could not exclude any white elector, who had complied with statutory requirements, from voting in its primary. In *County Democratic Executive Committee v. Booker*,¹⁵ the same Court held that the exclusion of Negroes from voting in Democratic primary elections is within the power of the party. In *Clancy v. Clough*,¹⁶ the Court of Civil Appeals at Galveston enjoined Democratic party officials from exacting of a white voter a pledge in addition to that prescribed by statute. But, in *White v. Lubbock*,¹⁷ the same Court in the same volume of reports declared the inherent power of the party to exclude Negroes from primary voting.

Similarly, the Supreme Court of Texas concluded in the leading case of *Love v. Wilcox*, *supra*, after elaborate review of legislative and judicial history, that neither past party disloyalty nor new forms of pledges as to fealty may bar

¹⁵ 53 S. W. (2d) 123 (1935).

¹⁶ 30 S. W. (2d) 569 (Tex. Civ. App. 1928).

¹⁷ 30 S. W. (2d) 722 (Tex. Civ. App. 1930).

or impede the elector who seeks to vote in a party primary. Yet in *Bell v. Hill*,¹⁸ the State Supreme Court determined that the party has inherent power to exclude Negroes from primary elections. It has already been pointed out in petitioner's principal brief that *Bell v. Hill* was decided on motion for leave to file a petition for writ of mandamus without the taking of testimony as to party structure or functioning. But beyond that, the report of the case shows that the motion for leave to file a petition for mandamus was presented to the Court on July 19 and the Court's decision was rendered the following day, July 20.

The Texas decisions in this field make clear two things and two things only; first, the courts of Texas are determined to sanction the exclusion of Negroes from voting in Democratic primaries; second, these same courts are equally determined that no other qualified electors shall be excluded.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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¹⁸ 123 Tex. 531, 74 S. W. (2d) 113 (1934).

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JUN 7 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. **949** 51

LONNIE E. SMITH,

Petitioner,

vs.


S. E. ALLWRIGHT, Election Judge, and JAMES J.
LIUZZA, Associate Election Judge, 48th Precinct of
Harris County, Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS, 
New York,
Counsel.

Of Counsel:

GEORGE CLIFTON EDWARDS,
Dallas, Texas.

IN THE
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OCTOBER TERM, 1942

No.

LONNIE E. SMITH,

Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA, Associate Election Judge, 4th Precinct of Harris County, Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the petitioner to the filing of this brief has been obtained. Attorney for the respondents has failed to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

May 3, 1943.

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Counsel for

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Amicus Curiae.

GEORGE CLIFTON EDWARDS,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF OF AMICUS CURIAE

I

The American Civil Liberties Union is a nation-wide organization devoted to the protection and enforcement of those great liberties preserved for us in our Constitution and our Bill of Rights. We believe that these liberties belong to us just so long as our country remains a democracy. And it is now an axiom that a democracy depends upon and functions through the ballot. For this reason any arbitrary and discriminatory restriction on the use of the ballot, particularly where it is based on

race, color, or creed, causes us to view such action with alarm as an impediment to the democratic process.

It is in this light that we have considered the resolution adopted by the Democratic Party in Texas on May 4, 1932 by which only white citizens of Texas were made eligible for membership in the party and hence entitled to vote in its primaries.

II

This case presents a simple question: Is the right to vote in the Texas Democratic primary a right granted by the United States Constitution?

In relying upon *Grovey v. Townsend*, 295 U. S. 45, the District Court confused the issue. The *Grovey* decision, based upon the 14th and 15th Amendments, was not concerned with the question of what affirmative rights are conferred by the Constitution, whether the Constitution guarantees a participation in a primary. Rather the *Grovey* case centered on a determination of the source of the discrimination, whether state action prevented voting in the primary. Directly in point here is *U. S. v. Classic*, 313 U. S. 299, which, mentioning neither *Grovey v. Townsend*, *supra*, nor (except to distinguish them, 313 U. S., at 315, 329), the 14th and 15th Amendments, held that the privilege of casting a vote in the Louisiana Democratic primary was a right bestowed by Article I, Sections 2 and 4 of the Constitution.* In this holding, all the justices concurred, for the dissent's only objection was to the interpretation of the Federal statute under which the prosecution was brought. In the present case

* Since Article I, Section 2 grants the right to vote for Congressional representatives, the parallel phraseology of Amendment 17 grants the same right in elections of United States Senators.

no issue of the agency enforcing the denial of the voting right is presented. Plaintiff, asking a declaratory judgment and damages for the deprivation of a right, requests merely that the Court repeat the *Classic* case's declaration of his constitutional right to vote in the Democratic primary. His claim for damages is sustained by the civil counterpart (U.S.C. Title 8, Section 43) of the Criminal Statute enforced in the *Classic* case (U.S.C. Title 18, Section 52). *Hague v. Committee for Industrial Organization; et al.*, 307 U. S. 496. Congress, in those sections, extended its active protection to the right granted by Article 1 and Amendment 17.*

United States v. Classic, *supra*, emphasizes that Article I of the Constitution must be read not in terms of methods of election in 1783 but "as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of the Government." Hence, the phases of the suffrage process encompassed today in the right to vote must be determined from the practical approach. The present Chief Justice, in his opinion, delved into the details of the Louisiana primary set-up to fortify his conclusion that in practical effect, the Louisiana Democratic primary was the main part of the election; hence amply included within the right to vote guaranteed by Article I, Section 2. However, the decision may be interpreted as setting up two categories, both of which are subject to Article I, Section 2. In addition to those primaries which from a realistic point of view elect the Congressman, a separate class would cover those states where the law necessitates a primary.

"Where the state law has made the primary an integral part of the procedure of choice, or where

* It is conceded that Sections 51 and 52, Title 18, of the United States Code do not enlarge or amplify any rights secured by Article 1, *Newberry v. U. S.*, 256 U. S. 232, and by implication the 17th Amendment.

in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, sec. 2. * * * Here, even apart from the circumstances that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative." *U. S. v. Classic*, 313 U. S. 299, at pp. 318-19.*

The situation in Texas meets both interpretations in the *Classic* case and both categories of the latter interpretation. It is well-known and accepted that nomination in the Democratic primary in Texas is tantamount to election. That the citizens of Texas themselves consider the Democratic primary the real election is evidenced by the reversal of the normal relationship between the total vote polled in primary and the total in the general election. In the non-presidential years, approximately three-quarters more votes were cast for Federal office in the Democratic primaries than were cast for Republican, Democratic and all other candidates together in the general election.**

* Attorney General Biddle has interpreted the *Classic* decision in like manner: "The decision also holds that the right of qualified electors to vote at the primary is an aspect of the right to choose representatives conferred by Article I, Section 2—and thus a right secured by the Constitution—if either of two conditions is met (a) if, under the governing state law, the primary is an 'integral part' of the electoral process; or (b) if, as a matter of fact, the primary is decisive of the ultimate election: Precisely the same result would follow in senatorial primaries under the 17th Amendment. On these points I do not understand that any of the justices disagree." 10 U. S. Law Week 2283 (1941).

** For example, in the 1930 Senatorial election, 651,619 votes were cast in the Democratic primary, while the total vote in the general election was 306,701; in 1934, 662,487 votes were cast in the Democratic primary while 454,408 were cast in the general election. (R 31-32).

The alternative test that the primary be an "integral part" of the election is likewise satisfied. Texas law makes mandatory that the Democratic party nominate by primary.* Furthermore the state regulations on the actual procedure of the primary are followed (R. 121). The failure to obtain all the expenses of the primary from the state's treasury, a fact emphasized by the District Court, in no way detracts from the conclusion that Texas has made the Democratic primary an integral part of the election. *Nixon v. Condon*, 286 U. S. 73.

It seems clear, therefore, that the right to vote in a primary of the kind extant in Texas is a right granted and protected by the Constitution of the United States.

The right to vote, along with the right to speak, meet, write, and worship freely, is the essence of American Democracy. Upon the judiciary rests the duty of countermanding all attempts, whether by direct act or by subterfuge, to destroy this right.

CONCLUSION

It is respectfully submitted that this Court grant the petition for the writ of certiorari prayed for.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS, *Counsel.*

Of Counsel:

GEORGE CLIFTON EDWARDS.

* All parties polling 100,000 votes or more in the last general election must hold primaries. The Democratic party always comes within the 100,000 or more bracket. Article 3101, Revised Civil Statutes of Texas, 1925.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E.
LUIZZA, Associate Election Judge, 48th Precinct of
Harris County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

↓ WHITNEY NORTH SEYMOUR,
Counsel for
American Civil Liberties Union;
Amicus Curiae.

Of Counsel:

GEORGE CLIFTON EDWARDS,
of Dallas, Texas.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

LONNIE E. SMITH,
Petitioner,

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas,

Respondents.

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. Only the consent of the attorney for the petitioner to the filing of this brief has been obtained.

Special reasons in support of this motion are set out in the accompanying brief.

October 18, 1943.

WHITNEY NORTH SEYMOUR,
Counsel, American Civil Liberties Union:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

LONNIE E. SMITH,
Petitioner,

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas,

Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Introduction

The American Civil Liberties Union is a nationwide organization, members of which reside in and are citizens of Texas. It is devoted to the protection of the Bill of Rights and the extension of democratic privileges. It has consistently opposed racial discrimination wherever the problem has arisen, and has fought against unreasonable limitations on the exercise of the right to vote.

Every substantial interference with the ballot is a blow at representative democratic government. We are particularly concerned, therefore, when, as in this case, many qualified citizens are effectively deprived of their participation in the choice of those who are to represent them and thus of the reality of the right to vote, solely because of race and color.

I

The importance of primaries and their integral relationship to the right to vote in general is today axiomatic.

The primary is an integral part of the entire elective machinery. It is essential to the operation of the democratic process that the voter be given an effective choice in a general election. Thus, over the entire nation, the position of the primary, as the means used in selecting the candidates among whom the electorate must choose, is of great importance.

It is common knowledge that in many States the primary is, in effect, the election. Selection of one party ticket or another, depending on the State, is an assurance of election.

“The fact is that the primary is the election in about one-half of the states, one-half of the counties, and one-half of the legislative congressional districts of the nation. The voter’s power is practically ended in these instances when the party nominations are once made. Theoretically and legally he can choose members of another party, but practically he will not do so in these jurisdictions. The significance of the primary as a part of the governing process is therefore very great, and should be examined with all the care given to an electoral process of a final nature.”¹

If the shield of the Constitution were to extend no further than the “final” choice it would, in many instances, be no safeguard at all. For the shield to be real

1. Merriam and Overacker—Primary Elections (1928) at p. 269.

and to accomplish its purpose, it must intervene at the stage when the electoral process may still be influenced by the voter and, therefore, at the primary elections.

II

The recent history of the "White Primary" in Texas shows a studied intent to disfranchise the Negro.

It hardly needs to be said that the commands of the Constitution have not been so uniformly accepted as to assure full participation of our Negro citizens in their electoral rights. Many efforts have been made to frustrate these commands, as previous decisions of this Court and common knowledge attest. Texas, as well as other States, has overlooked the constitutional injunctions. The recent history of changes in the electoral machinery of Texas statutes reflects the disposition to see to it that Negroes shall have no effective voice in the selection of candidates of the dominant party.

In 1923 Texas enacted the following statute:²

"All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

² Acts 2d C.S. 1923, p. 74, Article 3093a from Acts 1923.

In *Nixon v. Herndon*, 273 U. S. 536, this Court declared the provision violative of the Fourteenth Amendment.

In the next year (1928) the legislature of Texas enacted Ch. 67³ which permitted a similar result—the elimination of Negro electors. Removing the discrimination denounced by this Court from the face of the statute, it was nevertheless implemented so as to circumvent the decision.⁴

This Court again declined to countenance such discrimination, *Nixon v. Condon*, 286 U. S. 73.

Three weeks⁵ after the decision in *Nixon v. Condon*, *supra*, the Texas Democratic State Convention proceeded to a new formula to accomplish the same purpose by adopting the following resolution:

“Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations.”⁶

3. “Article 3107 (Ch. 67, Acts 1927) Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.”

4. Pursuant to this statute the following resolution was adopted by the Texas State Democratic Executive Committee:

“Resolved: That all white Democrats who are qualified and (sic) under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928 and August 25, 1928, and further, that the Chairman and the secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance.”

5. 43 Harv. Law Rev. 812 (1932).

6. See, *White v. County Democratic Executive Committee*, 60 F. (2d) 973, n. 1.

Unfortunately, when this newest episode in the series was presented to the Court, it came up on an inadequate record and the Court sustained the action against challenge under the Fourteenth and Fifteenth Amendments. *Grovey v. Townsend*, 295 U. S. 45. The inadequacies of that record have been corrected in the present record, where the true nature of the present restrictions and their consequences can at last be clearly observed.

This Court has frequently shown its determination not to allow the commands of the Constitution to be avoided by ingenious subterfuges. This record presents a proper opportunity to re-examine the *Grovey* case and to make sure that the franchise is not effectively denied on grounds of race to an important segment of the population of Texas.

III

Article 1, Section 2 of the Constitution protects every citizen in his right to choose candidates and vote at congressional elections.

As far back as *Ex Parte Yarbrough*, 110 U. S. 651,⁷ this Court held that the right to vote at Congressional elections was granted by the Federal Constitution, and that it safeguarded a qualified voter at such elections from violence by persons acting in their individual capacities.

In *Nixon v. Herndon*, *supra*, and *Nixon v. Condon*, *supra*, the protection of the Constitution was applied to attempts by State authorities to deprive the voter of his constitutional rights in primary elections.

⁷ See *United States v. Mosley*, 238 U. S. 383; *Swafford v. Templeton*, 185 U. S. 487; *Wiley v. Sinkler*, 179 U. S. 58.

In *United States v. Classic*, 313 U. S. 299, this Court held that the protection of the Constitution extends to qualified voters in primary elections for Federal office. In view of that decision it is difficult to see how studied interference with the right to vote in Federal elections can be without constitutional protection however the interference is disguised.

IV

This Court should now overrule its decision in *Grovey v. Townsend*.

Grovey v. Townsend, *supra*, was decided on demurrer so that the Court was necessarily restricted in its consideration.

The evidence, now for the first time fully presented in the record before the Court, indicates, among other things, that the Democratic party is not a closely organized private voluntary association with the usual attributes of such bodies;⁸ that the election laws of the State of Texas are actually so closely integrated with primary procedures that they cannot be separated from the actions of the Democratic party; and that the primary is, in fact, the election in Texas.

When grave constitutional questions are re-presented on records which permit a complete consideration and where the nature and consequences of discrimination are fully disclosed as they are here, the Court should have no reluctance to reconsider and reverse an earlier decision. (See the dissenting opinions in *Burnet v. Coronado Oil*

8. Cf. Merriam and Overacker, *Primary Elections* (1928), at p. 140; "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency, subject to legal regulation and control."

& Gas Co., 285 U. S. 393.)⁹ In the present state of the world, a further declaration by this Court of the principles underlying the constitutional safeguards of the ballot, denying the power of the majority, on grounds of race or color, to repress a minority which is contributing so much to the nation's cause, would be heartening to all who believe in human liberty and dignity.

Conclusion

The effective corollary of the great freedoms guaranteed by the Constitution is the right to vote. A reversal in this case should go far towards removing restrictions which now, especially, have no proper place in our democracy.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for
American Civil Liberties Union,
Amicus Curiae.

Of Counsel:

GEORGE CLIFTON EDWARDS,
of Dallas, Texas.

CLIFFORD FORSTER,
STANLEY LOWELL.

⁹ This Court has only recently overruled two of its decisions involving important civil rights. See *Murdock v. Pennsylvania*, 87 Law. Ed. 827, overruling *Jones v. Opelika*, 316 U. S. 597; and *West Virginia State Board of Education*, 87 Law. Ed. 1171, overruling *Minersville School Dist. v. Gobitis*, 310 U. S. 586.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

against

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA,
Associate Election Judge, 48th Precinct of Harris
County, Texas,

Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE, AND BRIEF IN SUPPORT THEREOF**

NATIONAL LAWYERS GUILD,
Committee on Constitutional Liberties,
as Amicus Curiae,

OSMOND K. FRAENKEL, *Chairman,*
Of Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the Committee on Constitutional Liberties of the National Lawyers Guild, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the petitioner to the filing of this brief has been obtained. Attorney for the respondents has failed to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

Dated, September 17, 1943.

OSMOND K. FRAENKEL,
Counsel for National Lawyers Guild,
Committee on Constitutional Liberties,
as amicus curiae.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

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S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA,
Associate Election Judge, 48th Precinct of Harris
County, Texas,

Respondents.

**BRIEF OF THE NATIONAL LAWYERS GUILD
AS AMICUS CURIAE**

The National Lawyers Guild, by its Committee on Constitutional Liberties, asks leave to file this brief herein because of its concern with problems of racial discrimination. We believe it is of the essence of the American Constitution that there be no differentiation between citizens because of race and that in the present time of war it is of especial importance that this principle be recognized and enforced. And in no field is this principle of greater importance than in that here involved. For the elective franchise is the cornerstone of democracy. If that be tainted by the exclusion of any body of citizens, particularly if the exclusion be on racial grounds, then the structure of democracy is in grave danger.

So we come to the precise problems here involved:
1. May a Negro be excluded from participation in the democratic primary because of a resolution purporting to

have been adopted by the state representatives of the party excluding Negroes from membership in that party? 2. And, whatever might be the answer to that problem in general, may there be such exclusion when, as is the case in Texas, by stipulation, nomination by the democratic party in effect ensures election? 3. Finally, can a Negro be excluded on the purported ground of non-membership in the party when Whites are allowed to vote without inquiry as to party affiliation?

1: While this Court, in the *Grèvey* case, 295 U. S. 47, rejected the argument there made that a Negro could not be excluded from participation in a primary that controlled the election, its later decision in the *Classic* case, 313 U. S. 301, indicates a changed view on that point. There the Court clearly indicated that if the primary "effectively controls the choice" the federal government had power to regulate such primary, insofar as elections for members of Congress were concerned. Clearly, if federal power extends to prevent fraud in such a primary, it likewise extends to prevent discrimination. So much appears conceded and was assumed in the Trial Court.

But the Trial Court believed that this point would not alone have sustained the decision in the *Classic* case. Since, however, this Court referred to its two grounds of decision in the disjunctive, there is no basis for concluding that it did not mean what it said. Indeed, the opinion separately reiterates this ground of decision:

"Here, even apart from the circumstances that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representatives. Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect pro-

foundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice."

We respectfully suggest, therefore, that the Trial Court misconceived the rule laid down by this Court and that whenever the primary in effect controls the election it becomes subject to federal regulation and is bound by the constitutional guarantees.

The Trial Court also expressed some doubt about whether the primary controlled the result. But of this there can be no doubt. The complaint (par. 12, R. 9) alleged that since 1859 all the democratic nominees, with two exceptions, had been elected to office and this was not denied in the answer (see R. 63) and was expressly admitted by stipulation (R. 72). Tables showing the results of elections for Governor, for United States Senator and for presidential electors were submitted (App. D. R. 28-57). Except in the years 1869 and 1894 the democratic nominee was elected Governor; only in 1872 and 1928 did the democratic presidential candidate fail to receive a majority of the votes; the democratic candidate for United States Senator has been elected ever since popular election of Senators began. And in the last four elections the total of all votes other than those cast for the democratic candidates for Governor and Senator was much less than 10% of the total vote cast. Under such circumstances it can hardly be doubted that the democratic primary determines the election.

The Circuit Court of Appeals merely said that it could see no substantial difference between the *Grovey* case and the one at bar. It did not enter into any discussion of the principles which governed this Court in deciding the *Classic* case. It pointed out only that this Court did not mention the *Grovey* case in its opinion in the *Classic* case.

We submit that the Circuit Court failed to appreciate that this Court had in the *Classic* case laid down a criterion which brings within the protection of the Constitution all voting in primaries, when the primary in effect controls the election.

We believe, therefore, that the *Classic* case has so far overruled the *Grove* case that a Negro cannot be denied participation in a primary which, as here, controls the election.

2. Even if this Court did not intend to modify the *Grove* case in the *Classic* case, we believe that the former decision should now be reconsidered and overruled. We recognize, of course, that this Court has consistently taken the position that neither the Fourteenth nor the Fifteenth Amendment applies to wrongs committed by private individuals, in that respect both being unlike the Thirteenth Amendment. And we realize that the language of the Fourteenth and Fifteenth Amendments justifies that position, however unfortunate its consequences may have been. Nevertheless, we believe that neither the language nor the history of these amendments requires so narrow an interpretation of what constitutes state action as was made when this Court held in the *Grove* case that the acts there complained of were private action.

The general issue here involved was first sharply raised in the *Civil Rights Cases*, 109 U. S. 3. There the Court, over the eloquent dissent of Justice Harlan, held that Congress had no power to declare that discrimination against Negroes practiced by innkeepers or common carriers was unlawful. The majority of the Court rejected the notion advanced in that case that the state's power to regulate businesses affected with a public interest made the acts of those businesses state acts within the Fourteenth and Fifteenth Amendments. But we submit that the decision in the *Civil Rights Cases* does not justify the conclusions arrived at in the *Grove* case.

For the relation between political parties and the state is quite different from the relation between businesses affected with a public interest and the state. Political parties are concerned with the most vital of all rights which exist in a democracy, the right of suffrage. The state has wide power of control over the manner in which political parties exercise their functions. To rule that discrimination by a political party in relation to voting is actually discrimination by the state is but to accept the realities of a situation and not to be misled by ingeniously devised forms. It should be observed that we are dealing in this case only with voting for public office. We are not here concerned with a right of a party to restrict its membership for the purpose of determining who may participate in the selection of its officials or the promulgation of its principles. We do not question that such acts are private acts, not state acts. But the choice of a political candidate, whether at a primary or at a general election, is not a private action, but a public one. It affects fundamental public rights and privileges. This is so whether or not state legislation directly concerns itself with primaries. All the more should it be so here where the Texas legislation requires that candidates of political parties be chosen at primary elections (Revised Civil Statutes Article 3101) and where such legislation contains detailed provisions for the safeguarding of the primary election (id.; see the various statutes listed in appendix "C" to the complaint). We submit, therefore, that voting at a primary election is such a matter of public concern that it cannot be considered the action of any private group. When the state permits a private group to function as a political party, though it bars persons from such voting merely because of their race, it in effect itself sanctions the discrimination and violates the Fourteenth and Fifteenth Amendments. The *Grovey* case should, therefore, be overruled.

3. There is a fact present in this case which was not present in the *Grovey* case which, we believe, requires a different conclusion here regardless of all other considerations. In the *Grovey* case this Court rested its determination on the assumption that only members of the democratic party were allowed to vote. The party had declared that only white persons could be members. Hence, it was implied, no Negroes could participate in the primary. The act of exclusion was, therefore, not the act of the election judges, but that of the party.

Here, however, it appears that the exclusion was the act of the election judges and that their supposed reliance on the exclusion by the party was a sham. For exclusion by the party could not directly affect the right to vote; it could affect only party membership. Therefore, if the election officers were excluding persons who were not party members, they were under an obligation to exclude all who were not party members. At least they could not discriminate on racial grounds. Yet this is just what they did here.

For defendant Allwright, the election judge, frankly admitted this discrimination. No attempt was made to determine whether white persons were, or were not, party members. He said:

"Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.

Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.

Q. And negroes are not permitted to vote in the primary election? A. They don't vote in the primary.

Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.

Q. And you do let them vote? A. Yes" (R. 106).

Now it is clear that, as a primary election judge, defendant was a state officer. The state law (Art. 2939) provides for such an election officer; it prescribes his qualifications (Art. 2955); it requires him to take an oath of office (Art. 3104); it fixes his powers (Art. 3105). When such an officer discriminates against persons solely because of their race he acts as a state officer and his action is reviewable under the guarantees of the United States Constitution. See *Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Condon*, 286 U. S. 73. And it makes no difference that the discrimination is not commanded by statute, but is the individual vagary of the state official. *Norris v. Alabama*, 294 U. S. 587.

So we submit that, since membership in the party was not the basis on which white persons were allowed to vote, non-membership was not the basis on which Negroes were excluded. The discrimination was, therefore, on the basis of their race and was forbidden by both the Fourteenth and Fifteenth Amendments to the United States Constitution.

It is respectfully submitted, therefore, that the judgment should be reversed and the prayer of the complaint granted.

• NATIONAL LAWYERS GUILD,
Committee on Constitutional Liberties,
as Amicus Curiae,

OSMOND K. FRAENKEL, Chairman,
Of Counsel.

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Supreme Court of the United States

October Term, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

against

**S. E. ALLWRIGHT, Election Judge and JAMES E. LUIZZA,
Associate Election Judge, 48th Precinct of Harris
County, Texas,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF THE WORKERS DEFENSE
LEAGUE, AMICUS CURIAE**

JOHN F. FINERTY,
Washington, D. C.,
Attorney for the Worker's Defense,
League, *Amicus Curiae.*

ERNEST FLEISCHMAN,
New York, N. Y.,
of Counsel.

Motion for Leave to File Brief as *Amicus Curiae*

TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:.

The undersigned, as counsel for the Workers Defense League, respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The consent of the attorneys for the petitioner to the filing of this brief has been obtained. The attorney for the respondents has failed to reply to repeated requests for such consent.

Special reasons in support of this motion are set out in the accompanying brief.

JOHN F. FINERTY,
Washington, D. C.,
Attorney for the Workers Defense
League, *Amicus Curiae*.

November 8, 1943.

Supreme Court of the United States

October Term, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

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S. E. ALLWRIGHT, Election Judge and JAMES E. LUIZZA,
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BRIEF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

The Workers Defense League is submitting a brief herein as *amicus curiae* because of its interest in the issue of race discrimination raised in this case.

The Workers Defense League is an organization dedicated to the protection and extension of those civil rights which are guaranteed by the laws and Constitutions of the United States and the several states.

It maintains that the right to vote and moreover, the right to participate in the election of candidates for public office, is the keystone of our democratic form of government. To deny that right to vote and the right to participate in primary elections to qualified Negro electors, when such primary elections are "*an integral part of the*

election machinery in the state which is determinative of Federal officers'" is to disfranchise a vast number of our citizenry. These disfranchised, who today give of their labor, fortunes and lives to our nation, must have the right to participate in their government if our democracy is to be a reality and more than a hollow shell.

The right to vote signifies more than the right to cast one's ballot at the general election. It signifies the right of qualified electors, to make and participate in the choice of the candidate at the primary election irrespective of whether or not the primary election candidate sometimes, always or never is the successful candidate at the final election. In this case, the petitioner, a native born citizen of the United States and a qualified elector, residing in Houston, Texas, was refused the right to vote at the primary on the Democratic ticket for the offices of United States Senator and Representatives of Congress.

Petitioner sought damages for himself and a declaratory judgment on the ground that such denial of the right to vote was a violation of Sections 31 and 43 of Title 8 of the United States Code, in that the respondents had subjected him to a deprivation of rights as provided for by Sections 2 and 4 of Article 1, and by the 14th, 15th and 17th Amendments of the United States Constitution. The Circuit Court of Appeals, affirming judgment for the respondents,² based its decision on the authority of *Grovey v. Townsend*³ and recognizing the implications of the decision rendered in *United States v. Classic*⁴ attempted to distinguish between that case and the case at bar. The court enumerated three distinctions. They were:

- (1) The *Classic* case was a criminal case, whereas this case arose out of a civil suit.

¹ This quotation is from the question presented by the petitioner for certiorari heretofore granted in this case.

² *Smith v. Allwright*, C. C. A. Texas, 131. Fed. (2) 593.

³ 295 U. S. 45.

⁴ 313 U. S. 299.

- (2) The *Classic* case involved Louisiana statutes whereas this case involves the Statutes of Texas.
- (3) In the *Classic* case, there was no opinion of the Court directly overruling the decision rendered in *Grovey v. Townsend*.

We shall take up these points seriatim. Although the *Classic* case did concern itself with a criminal action under Sections 19 and 20 of the Criminal Code (18 U. S. Code annotated, Sections 51 and 52), the rationale of the *Classic* case covers a civil action because Section 43, Title 8 of the United States Code Annotated is part of the same original act as Sections 19 and 20 of the Criminal Code. Therefore, the civil action based on a civil statute is merely another aspect of the criminal action based on the criminal statutes heretofore upheld in the *Classic* case.

The Circuit Court said that the *Classic* case also involved the statutes of the State of Louisiana and not the statutes of Texas. The court is correct in this statement, but although there is a distinction, there is no real difference, because the record will indicate that the statutes covering primary elections in both states are almost identical and in both states we note four important parallels. They are as follows:

- (a) Both states bear part of the expense of the primary elections.
- (b) The election of candidates by means of a primary election is required as to the Democratic party in both states.
- (c) A defeated candidate in the primaries cannot have his name on the ballot in the regular election.
- (d) The successful Democratic candidate, as a matter of fact, is assured of election.

The third and last point made by the Circuit Court is that the *Classic* case did not directly overrule the decision of the *Grovey* case. It must be noted that the *Classic* case was decided later in time than the *Grovey* case and we contend that the language in the *Classic* case does cover the issues involved in the case at bar.

The Court at page 316 of the *Classic* case stated:

"That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article 1 and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government, cannot be doubted".

The Court went on to say that it is immaterial whether the State chooses to hold the election in one or two steps when the primary is an integral part of the electoral process.

On page 318, the Court said:

"The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1, Section 2."

The Court also stated that it is not necessary that the primary choice be the invariable choice in the general election. Therefore, the implications of the *Classic* case covers situations which are not even as favorable as the one in the case at bar, because in Texas, as it was stipulated in the case herein, the Democratic Party primary choice is invariably the successful candidate of the general election.

The Court at page 318 of the *Classic* case stated:

"And this right of participation is protected just as the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary *which invariably, sometimes, or never determines the ultimate choice of the representatives.*" (Italics ours.)

On page 323 of the same decision, the Court indicated that there would have been further grounds for their decision if the persons aggrieved were Negroes since their rights would have been clearly protected by the Fourteenth Amendment of the Constitution of the United States.

In conclusion, it is our contention that the acts of the respondents complained of, were in direct violation of the petitioner's rights secured to him by Sections 2 and 4 of Article 1 and the Fourteenth, Fifteenth and Seventeenth Amendments of the United States Constitution.

Conclusion

WHEREFORE, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

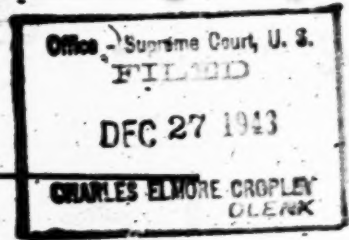
Respectfully submitted,

JOHN F. FINERTY,
Washington, D. C.,

Attorney for the Workers Defense
League, *Amicus Curiae.*

ERNEST FLEISCHMAN,
New York, N. Y.,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1943

No. 51

LONNIE E. SMITH, PETITIONER

v.

**S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,
Respondents.**

**BRIEF OF GERALD C. MANN. ATTORNEY
GENERAL OF TEXAS AS AMICUS CURIAE.**

**GERALD C. MANN,
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**BRIEF OF GERALD C. MANN, ATTORNEY
GENERAL OF TEXAS AS AMICUS CURIAE.**

To the Honorable Supreme Court:

Now comes Gerald C. Mann, Attorney General of Texas, leave of this court first having been obtained, and files this his amicus curiae brief in the above cause. He shows to the court that while the Democratic Party in Texas is purely political, and that as Attorney General he is not authorized to represent the party as such. The question involved in this litigation however is of such importance to the citizenship of Texas and to the preservation of the purity of the ballot in primary elections, that as Attorney General of Texas, he feels that it is his duty to file this brief.

He shows to the court that by reason of the far-reaching effect of the questions involved, and by reason of the fact that the respondents have not filed any brief in this court or appeared, that the question should be argued orally, and he has therefore requested permission of this court to argue same at such time as is convenient to the court.

The two major questions that are necessary to be determined in this litigation are:

POINT ONE: Is an election judge who conducts or holds a primary election for a political party in Texas a State officer?

POINT TWO: Have the white Democrats in Texas, or any other political group in Texas, the right to determine who, or what class of people or voters shall constitute the party they desire to organize?

PRELIMINARY STATEMENT

It is now well recognized in practically every state of the Union that in order to maintain a Democratic form of government, it is necessary to have political parties, which in turn select candidates for office from the President of the United States down to the smallest office-holder in the respective states.

In practically every state stringent laws have been enacted regulating these primary elections, or nominating conventions, in order to eliminate as far as

possible corruption and get the free, full and fair expression from those who constitute the particular party seeking to nominate or select its candidates for the respective offices.

Looking toward this end, the Legislature in Texas in 1903 passed its first full and complete primary election law. This law was entirely rewritten in 1905, and since that time has been amended in many respects to meet the contingencies and conditions that have arisen by reason of certain groups seeking to corrupt the ballot box in the primary election or nomination conventions.

So far as we have been able to ascertain the courts have never held that they had the right to determine who would or would not compose a particular political organization. Under the Constitution of the United States, as well as the Bill of Rights in Texas, citizens of the State have always had the privilege to create any kind of an organization they desired which does not violate the law.

POINT ONE (restated): Is an election judge who conducts or holds a primary election for a political party in Texas a State officer?

ARGUMENT AND AUTHORITIES UNDER POINT ONE

The highest courts in Texas have definitely held that the Chairman of the County Democratic Execu-

tive Committee is not an officer within the terms and definitions of the Constitution and laws of the State of Texas. Article 3101 of the Revised Statutes of Texas provides for the holding of a primary election to be held by each organized political party that casts more than one hundred thousand votes in the last general election to nominate candidates for all offices to be filled at the general election. The effect of this statute unquestionably was and is to require political parties in Texas which have sufficient strength to have cast as many as one hundred thousand votes in the preceding general election to nominate its candidates if any or desired by a primary election. This law was evidently passed to prevent a small group within such political party from meeting in a convention and nominating such officers.

Article 3104 of the Revised Statutes of Texas provides that the primary election shall be conducted by a presiding judge to be appointed by a Chairman of the County Executive Committee of the party, with the assistance and approval of at least a majority of the members of the County Executive Committee. The presiding judge is then authorized to select his associate judge and clerks.

In order that peace may be preserved and no disturbing element prevent the election from being held in an orderly manner, Article 3105 of the Revised Statutes gives to the judges of the primary election authority to maintain peace and order, and if necessary, arrest any person causing disturbance within one hundred feet of the election polling place.

Article 3105 of the present statute is in the exact language of Article 3090 of the Revised Statutes of Texas of 1911, and was passed by the Legislature in 1905.

In 1907 the Court of Criminal Appeals in Texas, which is the court of last resort in criminal matters, in the case of *Ex parte Anderson*, 51 Tex. Cr. R. 239, 102 S. W. 727, passed directly upon the question as to whether the County Chairman of the Democratic Executive Committee was an officer under the provisions of the Texas Constitution and law. In said case it appears that a prohibition election had been held, and the presiding judge at one of the largest voting boxes was the chairman of the Democratic Executive Committee. The contention was made that the election was void because of said fact. In overruling this contention, the court used the following language:

"Relator insists that the local option law is invalid because the presiding judge of the voting precinct No. 2 in the local option election was at the time of holding of said election an officer of trust under the laws of this state, to-wit, was chairman of the Democratic executive committee, having been theretofore elected to said office at the primary election held in said county on July 28th. The insistence is that he was thus holding two offices of profit and trust. We do not think there is anything in this contention. To be chairman of the Democratic executive committee for the county was not an office of profit and trust within the contemplation of the laws of this state. * * * "

In the case of *Walker v. Mobley*, 101 Tex. 28, 103 S. W. 490, the Supreme Court of Texas definitely passed upon the question as to whether the County Chairman of the Democratic Executive Committee of a particular county was an officer, within the purview of our Constitution and law, and held specifically that he was not, and in so doing, used the following language:

" * * * . The ground of disqualification urged is that the chairman of an executive committee of a political party is an officer of the state or county. There is nothing in the language of the law or the Constitution to support the contention. Dean (who was chairman of the county Democratic executive committee) was not disqualified to act as judge of the (prohibition) election."

The same question came before the Court of Civil Appeals in Texas in case of *Walker v. Hopping*, 226 S. W. 146, and no application for writ of error was made in said case. The Court of Civil Appeals at Amarillo in said case in holding that the members of the Democratic County Executive Committee were not state officers used the following language:

"(3) Appellant first advances the proposition that the executive committeemen provided for by this article of the statute are officers within the provisions of article 16, § 17, of the Constitution, reading:

" 'All officers within this state shall continue to perform the duties of their offices until their

successors shall be duly qualified.'

"We think that the term 'officers,' referred to in the Constitution, has reference to public or governmental officers, and that the officers of a political party, although provided for by statutory law, are not to be regarded as public or governmental officers. *Coy v. Schneider*, 218 S. W. 479; *Waples v. Marrast*, 108 Tex. 5; *Walker v. Mobley*, 101 Tex. 28. A reference to the decisions cited, we believe, will render a further discussion of this proposition superfluous."

In *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180, the Supreme Court of Texas held unconstitutional that portion of the primary election law in Texas which required the various counties to pay the expenses of said primary elections. In said opinion the court reviewed at length the entire primary election law. It held specifically that the nomination by political parties of their officers was not a State business, and could not, therefore, be paid for with State money, and we think in effect definitely held that the officers of a political party were not in any sense of the word officers of the State. The court used the following language:

(6) * * * "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord

with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage.

* * *

"The great powers of the State,—and the taxing power is the one to be always the most carefully guarded,—cannot be used, in our opinion, in aid of any political party or to promote the purposes of all political parties. * * *

"To provide nominees of political parties for the people to vote upon in the general elections is not the business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. If it is not the business of the State to see that such nominations are made, as it clearly is not, the public revenues cannot be employed in that connection. * * * Political parties are political instrumentalities. They are in no sense governmental instrumentalities."

While petitioner seeks to minimize the opinion of

this court in the case of *Grovey v. Townsend*, 295 U. S. 45, on the theory that the facts were not developed in that case, we submit that the entire question as to whether the election judge is a State officer was fully and definitely settled by this court. The primary election law in Texas has not been in any way changed or modified since said opinion was written. The opening sentence on page 48 of the *Grovey v. Townsend* opinion reads:

"The charge is that respondent, a state officer, in refusing to furnish petitioner a ballot, obeyed the law of Texas, and its consequent denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution."

After discussing said proposition at length, and citing numerous authorities from the State of Texas, this court on page 53 of said opinion, used this language:

"In the light of the principles so announced, we are unable to characterize the managers of the primary election as State officers in such sense that any action taken by them in obedience to the mandate of the State convention respecting eligibility to participate in the organization's deliberation, is the State action."

While it is true the Legislature in Texas has attempted to throw every safeguard around primary elections held by any and all political parties who seek to nominate candidates for office, in order to

preserve the purity of the ballot, the Texas Legislature has not attempted to control who must be the members of any political branch or party. It did attempt to pay the expenses of primary elections, but as before stated, our courts held under our Constitution the Legislature could not do so.

POINT TWO (restated): Have the white Democrats in Texas, or any other political group in Texas, the right to determine who, or what class of people or voters shall constitute the party they desire to organize?

ARGUMENT AND AUTHORITIES UNDER POINT TWO

As we construe same, it is petitioner's contention that a political party in Texas cannot determine who shall be a member thereof. We submit this proposition is not tenable. To say that any group of citizens cannot lawfully assemble and organize a political party for the purpose of nominating candidates for office would be to deprive them of the inalienable right given under the First Amendment to the Federal Constitution as well as Sec. 27 of the Bill of Rights in the State of Texas. On page 29 in the brief filed herein by petitioner, he states there are now in Texas 540,565 adult Negro citizens. If these Negro citizens in Texas desire to organize a political party, petitioner would not, we are confident, argue that they could not do so. Neither would this court, we are constrained to believe, hold that they could not organize a political party in the State of Texas,

and exclude from said Party all persons except Negroes.

We have in Texas approximately 400,000 Mexicans. Unquestionably, under their constitutional rights, they are entitled to organize a political party to be composed entirely of Mexicans, and no one would, we think, contend that they did not have this inalienable constitutional right.

We have in Texas some 300,000 Republican voters, who are adherents to and believers in the principles of the Republican party. While this number is not sufficient to elect officers in most districts or precincts of the State, no one would contend that they are not entitled to create a political party and limit their membership to Republicans.

By the same token and reason there cannot, we submit, be any reason why the white Democrats in Texas may not organize for themselves a political party in Texas. Whether this is wise is not a question for the courts to determine, and we submit is a matter over which the courts cannot within the Constitution exercise or control their actions. For the courts to say that any group of citizens cannot meet peacefully and quietly and nominate candidates for political offices would be to deny them the inalienable rights for which our forefathers fought and the principles upon which this Government is founded.

The above general principles, we think, have been

definitely settled by the decisions of the Supreme Court, as well as by the courts of last resort in Texas. This court in *Grovey v. Townsend*, supra, stated:

"Fourth. The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the primary election of July 9, 1934, and that in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that a Negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him this suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the State need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of their race or color is prohibited by the Federal Constitution."

In the case of *Drake v. Executive Committee of the Democratic Party*, 2 Fed. Supp. 486, the District Court in Texas held that the Democratic party in Houston could exclude Negroes from voting in the primary election to nominate city officers, and used this language:

"(4, 5). This then brings forward the question of whether, in the absence of a controlling statute of the state, a political party in Texas, acting through its convention, committee, or otherwise under party rules and regulations, has inherent power to prescribe the qualifications of its members. I think this must be answered in the affirmative, *Nixon v. Condon*, 49 F. (2d) 1012, *White v. Democratic Executive Committee*, 60 F. (2) 973, and that the action of defendant, city executive committee (acting not under powers derived from the state, and not as an agency of the state, but presumably in accordance with rules and regulations of the Democratic Party), in so denying plaintiff the right to vote in such primary election, does not violate plaintiff's rights under the Fourteenth Amendment."

In the case of *Bell v. Hill*, 123 Tex. 531, 74 S. W. (2) 113, the State of Texas, speaking through its then Chief Justice, Judge Cureton, discussed at length the organization of political parties, what they were, and their functions, and the power of a political convention to determine its membership, and to restrict its membership to white citizens. The case involved a mandamus, wherein the petitioners, Bell and Jones, who were Negroes, sought a mandatory injunction against the members of the Democratic Executive Committee in Jasper County to require them to permit the petitioners to vote in the Democratic primaries in 1934. The court used this language, beginning with the last paragraph on column 1, p. 119, 74 S. W.

◆ "We come now to the constitutional basis of

political parties, as well as other voluntary associations. That basis is found in the first section of the Bill of Rights, the First Amendment to the Constitution of the United States, which declares: 'CONGRESS SHALL MAKE NO LAW respecting an establishment of religion, or prohibiting the free exercise thereof; or ABRIDGING the freedom of speech, or of the press; or the RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.'

“ * * *

“In *United States v. Cruikshank*, 92 U. S., 542, the Supreme Court of the United States, in an opinion by Chief Justice Waite, declared: 'The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.'

“Section 27 of the Bill of Rights, art. 1, Constitution of Texas, reads: 'The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.'

"The applicability of this section of the Bill of Rights to political associations is made manifest when we consider section 2 of the Bill of Rights, which declares: 'All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.'

" * * *

"(3, 4) Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the power of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances be conferred upon a state or governmental agency.

" * * *

"(8) * * * There is no limitation contained in article 3167 with reference to declarations of

policy by a State Democratic Convention called for the purpose of electing delegates to a National Convention. Necessarily such convention has the same power and authority to determine the membership of the party as any other State Convention of the party would have. The statute does not in any way attempt to limit the power of such Convention; and, indeed, under our view of the Bill of Rights, the Legislature could not limit its power with reference to either policies or membership. A National Party Convention necessarily formulates a platform and policies, and if the will of a state party is to be made known to a National Convention, it necessarily has the power to formulate its policies and define its membership."

In *Scurry v. Nicholson*, 9 S. W. (2) 747, the Court of Civil Appeals in holding that a political party could determine its membership and fix its policies stated:

"(4-6) We think it must be conceded that, in the absence of some legislative interdict, that the Democratic executive committee of any single county may properly enforce a rule or regulation prescribed and enforced by the supreme powers of the organization, and it is common knowledge, of which we may take judicial notice, that, in the late state Democratic convention, that body unhesitatingly refused to recognize and ousted delegates from a number of counties, including Tarrant county, who had avowed their purpose of supporting the nominees of the Republican Party for President and Vice President. It is likewise so known to us that the Democratic executive committee of the nation

peremptorily ousted and named another in place of a member of the national Democratic executive committee from the same county on the same ground. * * * ”

In *White v. Lubbock*, 30 S. W. (2) 722, the Court in discussing the power of the Democratic Party to determine who should vote in its primary elections, used the following language:

“(3-5) In a state like Texas, where the political parties have not by law been made either to perform any governmental function or to constitute any governmental agency by the payment by the State of their expenses of operation, or otherwise, but have only been regulated—however elaborately—as to how they shall elect their nominees (*Waples v. Marrast*, 108.Tex. 5), they are not state instrumentalities, but merely bodies of individuals banded together for the propagation of the political principles or beliefs that they desire to have incorporated into the public policies of the government, and as such have the power, beyond statutory control, to prescribe what persons shall participate as voters in their conventions or primaries; in no event, therefore, did the inveighed-against course of both the state and Harris county managers of the Democratic Party of Texas in so barring all but white Democrats from its primaries constitute action by the State of Texas itself that was interdicted by the invoked provisions of the National Constitution, but only the valid exercise through its proper officers of such party’s inherent power (recognized but not created by R. S. article 3107) to determine who should make up the membership of its own private household. * * * ”

In *Love v. Buckner*, 121 Tex. 369, 49 S. W. (2) 425, the Supreme Court of Texas held that the Democratic State Executive Committee was authorized to require the voters to take the specific pledge to support the nominees of the Democratic party for President and Vice-President before they could vote in the Democratic convention held to elect delegates to the national convention and used this language:

"We do not think it consistent with the history and usages of parties in this state nor with the course of our legislation to regard the respective parties or the State Executive Committee has denied all power over the party membership, conventions, and primaries, save where such power may be found to have been expressly delegated by statute. On the contrary, the statutes recognize party organizations including the State committees, as the repositories of party power, which the Legislature has sought to control or regulate only so far as was deemed necessary for important governmental ends such as purity of the ballot and integrity in the ascertainment and fulfillment of the party will as declared by its membership. * * *

"It is true the statute forbids participation in the precinct primary conventions of those who are not certified qualified voters, but the only voters referred to throughout the Article as comprising the precinct primary convention, and who can determine the real and effective party decisions are the voters of said political party."

Petitioners in their brief make the statement that

any white citizen of Texas can vote in the Democratic primary election, basing this statement, we presume, upon the testimony of Mr. Allwright, one of the respondents, who was the election judge in the precinct in which the petitioners offered to vote, wherein Allwright testified that if any white citizen came to the polls and offered to vote he himself did not question them, but permitted them to vote.

Article 3109 of the Revised Statutes of Texas provides that in all general primary elections there shall be an official ballot prepared by the party holding same.

Article 3110 of the Revised Statutes of Texas provides specifically that the official ballot may have printed thereon the following primary test: "I am a (insert name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary," and any ballot which shall not contain such printed test above the names of the candidates thereon shall be void and shall not be counted."

We submit that under the authorities above cited the election judge has the right to presume that a man who presents himself as a voter is in fact a member of the Democratic party and will support its nominees, and that no one who is a Republican or who is affiliated with any other political party will offer to vote. If any voter's right to vote is challenged on the ground that he is not a member of the party, then the judge can refuse to permit the vote

to be cast unless the voter will take the required pledge.

In *Love v. Buckner*, 49 S. W. (2) 426, the court at page 426, column 1, stated:

"In our opinion, a voter cannot take part in a primary or convention of a party to name party nominees without assuming an obligation binding on the voter's honor and conscience. Such obligation inheres in the very nature of his act, entirely regardless of any express pledge, and entirely regardless of the requirements of any statute. * * * Being unenforcible through the court, the obligation is a moral obligation. *Westerman v. Mims*, 116 Tex. 371.

"The opinion in *Westerman v. Mins* quoted with approval the decision of the Supreme Court of Louisiana in the case of *State Ex rel v. Michel, Secretary of State*, 46 So. 430, to the effect that 'the voter by participating in a primary impliedly promises and binds himself in honor to support the nominee, and that a statute which exacts from him an express promise to that effect adds nothing to his moral obligation and does not undertake to add anything to his legal obligation. The man who cannot be held by a promise which he knows he has impliedly given will not be held by an express promise.'"

As is revealed by a number of the opinions of the Supreme Court of Texas, hereinabove referred to and quoted from, unquestionably the Democratic party in Texas can exclude from participation in its primary election all voters who refuse to take the

pledge of allegiance to the party, or who refuse to support the nominee of the primary election or convention at the general election to be held thereafter. Whether the party exercises this right or privilege is of no concern to the petitioners in this case. It is true, however, as is shown by the cases hereinbefore quoted from, that the Democratic party in Texas has definitely passed resolutions restricting its membership to those white citizens who are Democrats and who are willing to take a pledge, to support the nominees of the convention or primary election.

GROVEY V. CLASSIC CASES

While we do not consider it necessary to attempt to reconcile the opinions of this court in the case of *Grovey v. Townsend*, 295 U. S. 45, and *United States v. Classic*, 313 U. S. 299, we submit that the facts in the two cases are so different that the opinion in one does not necessarily control the opinion in the other case.

The primary question determined in the *Grovey v. Townsend* case was that an election judge holding the primary election in Texas for the Democratic party was not a state officer, and that the Democratic party could for itself determine the kind and class of voters that could participate in the Democratic party, without violating the Federal Constitution or the Constitution of the State of Texas.

In the case of *United States v. Classic* it appears

the State of Louisiana had made the primary election law a state matter, paid for by the State, and controlled by the State, and it was charged that one of the election judges holding said primary election counted votes cast for a candidate for Congress for another and entirely different candidate. By reason of this alleged open fraud and violation of law, the election judge was indicted under the Federal criminal statutes, and this court held that in such an election, in order to maintain the purity of the ballot, the election judge could not claim immunity by reason of the fact that the election being held in which he fraudulently and criminally counted ballots was a Democratic primary.

While it is not necessary to determine the question, it may be that in a Democratic primary held in Texas, or a Republican primary held in any state where the nomination of the party candidate as a matter of history results in the election of such candidate, (said primary election being held under the laws of the respective state governing same), if the election judge should fraudulently, deliberately and criminally count ballots cast for one candidate for Congress for another candidate and thereby defeat the nomination of a particular candidate for Congress, the judge could be prosecuted under the Federal statutes. This question is not before the court in the case at bar, and therefore need not be determined.

In Texas the State has not attempted to control who may organize a political party. It has passed

most stringent laws regulating any and all political parties with reference to the manner of holding primary election or conventions for the nomination of candidates for the respective offices, including Presidential electors, Senators, Congressmen and all State officers. The State of Texas is not interested in who constitutes a party, or what class of citizens may become members of any particular party. It is interested, of course, in maintaining the purity and integrity of the ballot or elections held by any party.

Article 1, section 2, and Article 17 of the Constitution of the United States secures to the citizens of the several States who are "qualified electors for the most numerous branch of the state legislature" the right to choose the state's representatives to the Congress.

Petitioners contend that these provisions secure to such qualified electors the right to participate in the procedure by which members of a private political organization choose its candidates, at least where the party's candidates are almost invariably elected.

The Attorney General submits that this contention is both unsound and untenable.

It is familiar doctrine that provisions in the Constitution preserving to the people certain rights and privileges were designed to render such rights and privileges immune from denial or abridgment by governmental action. Before placing a construction

on the provisions involved in this case which assumes a purpose to grant a right immune from private abridgment, it is proper, we think, to consider the extremes to which such construction must inevitably lead. Since the problem of construction is to ascertain the intent, we must be prepared to hold that the inevitable consequences of a particular construction were intended, else we are not at liberty to adopt the construction.

The Constitution prescribes the qualifications of those to whom it gives the right to choose the state's representatives to the Congress. Those qualifications must be the same as those required by the State to render them "qualified electors for the most numerous branch of the state legislature." If those possessing such qualifications are accorded by the Constitution the right to participate in the procedure for selecting candidates established by a private political organization, indisputably such private political organization may not prescribe other or different qualifications as a prerequisite to the exercise of the right. Such organization may not accord the right only to qualified electors who entertain certain political beliefs, denying it to qualified electors who espouse a different set of political principles.

The effect is to deny to those "qualified electors" holding certain political beliefs in common the right to organize and select candidates to advocate those beliefs. For, if participation in the procedure cannot be restricted to those of common political ideals,

there can be no assurance that the candidates nominated will represent those ideals.

The nomination for election of candidates espousing a particular set of political principles is the essential function of the political party. To give the Constitution the construction contended for by petitioners is to declare that the people intended to prohibit the organization of political parties, by the adoption of that instrument.

Further, we desire to call to the attention of the Court the provisions of Section 2 of Article 14 of the Constitution. This section declares that when the right to vote at any election for the choice of electors for President and Vice-President, or representatives to the Congress, is denied to any of the male inhabitants over twenty-one years of age, the basis of State representation in Congress shall be reduced "in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

If a private political party in a state is invariably successful in procuring the election of its candidates and through private action of its membership excludes large numbers of "qualified electors" from participation in the party procedure for selecting its candidates, is the State subject to the penalty prescribed in Section 2 of Article 14? If such "qualified electors" have a Constitutional right to participate in the party procedure, it would seem so. Certainly if a party primary is an "election" within the

meaning of Constitutional provisions granting the right to vote, it is an "election" within the meaning of those provisions prescribing a penalty for denying that right.

The result would be, if we are correct in this assumption, that the people in adopting the Constitution intended that the representation of a State in the Congress should be subject to reduction on account of purely private action of a part of its citizens.

The extremes to which an adoption of the construction contended for by petitioners lead, we think, demonstrate the fallacy of their argument.

If the Constitution secures the right contended for by petitioners, the right is of a most peculiar character, and it is most difficult to determine when and under what circumstances it comes into being.

It seems to be urged that the right to participate in the party procedure exists where the party is always successful in procuring the election of its candidates. At what stage of the political life of a party would this "right" come into existence? Will success on the first occasion after the organization of the party give rise to the right, or must there be a longer period of gestation? If, after a long period of success, the party loses an election, is the right lost? For what period does it remain dormant; how much success, after a loss, does it take to revive the right? If a party is always successful in State-

wide elections, but not in particular district elections, does the "qualified elector" have the right to participate in the primary for the selection of candidates for the State-wide election but not for the selection of candidates for the district election?

Conceding the invariable success of the "Democratic" party, over a long period of years, how is it to be determined that the party is the same through that period? Is the test of party identity the mere "party label"? Or does the identity of the party through the period depend on substantial sameness of membership, or upon substantial sameness of principles through the years, or upon some combination of characteristics?

It is respectfully submitted that the Constitution does not grant a right to participate in party procedure of a private nature, the existence of which depends upon the answer to be made to such fact questions.

CONCLUSION

The Attorney General of Texas submits that the basic principle announced in all the decisions of our courts relative to the conduct of primary elections by political parties to nominate candidates is that the party can regulate its policies, and determine who shall constitute its membership, unless specifically prohibited by statutory law.

In Texas the Legislature has passed laws to con-

trol the primary election in many respects. It has not, however, passed any law which in any way prevents the white Democrats or any other group of citizens from organizing a political party to nominate candidates for any or all offices to be voted upon in the general election.

The Attorney General of Texas prays that the judgment of the trial court and the Circuit Court be in all things affirmed.

GERALD C. MANN,
Attorney General of Texas

R. W. FAIRCHILD

A handwritten signature in cursive script, reading "George W. Barcus".

GEORGE W. BARCUS
Assistant Attorney General
Attorneys for Amicus
Curiae

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

vs.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL.,
Respondents

BRIEF OF GEORGE A. BUTLER,
Chairman of State Democratic Executive Committee
of Texas as Amicus Curiae

WRIGHT MORROW,
Counsel for Amicus Curiae

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
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JAMES J. LIUZZA, ASSOCIATE ELECTION JUDGE,
FOURTH PRECINCT OF HARRIS COUNTY, TEXAS,
Respondents

MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE

TO THE HONORABLE SUPREME COURT:

Now comes George A. Butler, Chairman of the State Democratic Executive Committee of Texas, and respectfully moves the court for leave to file the accompanying brief in this case as Amicus Curiae. The consent of the at-

torney for respondents has been obtained. Consent of attorneys for petitioner has not been received as of the time of the mailing of this brief.

Special reasons in support of this motion are set out in the accompanying brief.

WRIGHT MORROW,
Counsel for Amicus Curiae

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

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vs.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL.,
Respondents

BRIEF OF AMICUS CURIAE

Amicus Curiae is Chairman of the State Democratic Executive Committee of Texas. This Committee is composed of one male and one female committeeman from each of the thirty-one state senatorial districts of Texas; the chairman and the members of the committee were regularly elected at the Texas State Democratic Convention held in Austin, Texas, in September, 1942. As Chairman of this committee, he is vitally interested in all matters affecting the operations and affairs of the Democratic Party in Texas, and the con-

duct of the party's primary elections out of which this suit arises.

Preliminary Statement

On May 24th, 1932, the Democratic Party of Texas, assembled in convention at Houston, Texas, unanimously adopted the following resolution:

"BE IT RESOLVED, that all white citizens of the State of Texas, who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations" (R. 75).

Respondents were the Presiding Judge and Associate Judge of the Democratic Primaries in Precinct 48, Harris County, Texas, on July 27, 1940, and August 24, 1940. Respondent Allwright had been elected by the Democrats of Precinct 48 as their party chairman of such Precinct; and thereafter, following party custom, was made presiding judge to hold the two primaries for the Democratic Party by the chairman of the Harris County Democratic Executive Committee (R. 76). Respondent Liuzza was appointed associate judge (R. 76). Respondents received their instructions with reference to holding such primary from the County Chairman (R. 76). All instructions to the presiding judges, assistant judges, clerks and supervisors at such primary elections came from Charles E. Kamp, Chairman of the Harris County Democratic Executive Committee, or the regulations were promulgated by the Executive Committee itself at a meeting of its membership held approximately one month before the first primary election (R. 140). The election judge conducted the election in accordance with the instructions thus received (R. 107). The Harris County Democratic Executive Committee determined how many

clerks the respondents should have (R. 107); it fixed the compensation for the election officials (R. 107). The entire expense of holding and conducting primaries in Harris County on July 27, 1940, and August 24, 1940, was borne and paid for by the Harris County Democratic Executive Committee from funds received by levying an assessment against each person whose name was placed upon the primary ballot (R. 76). After such primary elections the names of the candidates receiving the nomination were certified by the Democratic County Executive Committee to the party's State Executive Committee, which in turn certified the party's nominees to the Secretary of State, who placed their names on the general election ballot to be voted on in the general elections (R. 74). In the general elections negro electors could and did vote (R. 74, 108).

The policy of the Democratic Party is adopted at gubernatorial conventions (R. 126). The Executive Committee arranges the place for the meeting, the State Committee sets up a program for the temporary officers, which are usually confirmed from then on, the temporary officers put the Convention in operation, and after the Convention is over the management of the party reverts to the Executive Committee which carries out the policies adopted by the Convention (R. 124, 125). The county convention is a political unit in itself; the county convention elects its own chairman and precinct chairmen and they function as the election organization (R. 124). The Democratic Party of Texas is a political party and the Harris County Democratic Party is a subdivision of the state-wide political party (R. 140).

Question Involved

Does the Democratic Party in Texas, a voluntary association of persons of common political beliefs, have a right to

prescribe the qualifications of its membership and electors for the selection of the party's nominees for office?

Argument and Authorities

This court has previously had before it three cases arising in Texas involving the Democratic Party primary elections. In the case of *NIXON v. HERNDON*, 273 U.S. 536 (1927), the court had before it for consideration the attack on the constitutionality of Article 3107 of the REVISED CIVIL STATUTES, 1925, which read:

"In no event shall a negro be eligible to participate in a Democratic party election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same."

This court found the above statute offensive to the FOURTEENTH AMENDMENT to the CONSTITUTION, the court pointing out that color cannot be made the basis of a *statutory* classification.

In *NIXON v. CONDON*, 286 U.S. 73 (1932), this court, speaking through Mr. JUSTICE CARDOZO, referred to the *NIXON v. HERNDON* case, *supra*, in the opening language of its opinion and referring to Article 3017 stricken down in that decision stated: "While that mandate was in force, the negro was shut out from a share in primary elections, *not in obedience to the will of the party speaking through the party organs, but by the command of the state itself, speaking by the voice of its chosen representatives.*" (Italics ours).

In *NIXON v. CONDON*, *supra*, the court had before it a resolution adopted by the State Democratic Executive Committee limiting the right to vote in primary elections to white democrats who are qualified and none others, such

resolution having been adopted by the State Democratic Executive Committee of Texas under authority of Article 3107 (Chapter 67, Acts 1927), which article provided:

"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

The court held that the above quoted Statute constituted a grant of power by the State to the Executive Committee which it did not otherwise possess as a mere agent of the party. The court stated: "Whatever inherent power a state political party has to determine the content of its membership resides in the state convention. Bryce, Modern Democracies, Vol. 2, p. 40." * * * "Never has the state convention made declaration of a will to bar negroes of the state from admission to the party ranks. Counsel for the respondent so conceded upon the hearing in this court. Whatever power of exclusion has been exercised by the members of the Committee has come to them, therefore, not as the delegates of the party, but as the delegates of the state. Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the Committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the Committee yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so entrenched is statutory, not inherent. If the State had not

conferred it, there would be hardly color of right to give a basis for its exercise."

In the *NIXON v. CONDON* case, the court expressly reserved decision on the validity of action by the Democratic Party itself in Texas which had the effect of restricting its membership to white democrats.

The issue raised and the contentions made by petitioners in the present case was finally placed directly before this court in *GROVEY v. TOWNSEND*, 295 U.S. 45 (1935). In that case the court had before it the resolution of the State Democratic Convention of Texas adopted May 24, 1932, which is the same resolution which was in effect at the time of the occurrences out of which the present suit arises (R. 75). Such resolution provided:

"Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

The court referred to its previous decisions in *NIXON v. HERNDON* and *NIXON v. CONDON* and pointed out that in those cases it had held that the denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution, but "Here the qualifications of citizens to participate in party councils and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action."

In *GROVEY v. TOWNSEND* it was argued, as it is argued in the present case, that the elaborate statutory provisions set up in Texas with reference to the primary elections had the effect of making the party primaries state elections as fully as general elections and had the further effect of making

those who managed the primaries state officers subject to state direction and control. In reply to this argument, the Supreme Court said:

"While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the state, but by members of the party seeking nomination (Arts. 3108, 3116); the ballots are furnished not by the state, but by the agencies of the party (Arts. 3109, 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123, 3124-5, 3127); and the state recognizes the state convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136, 3139)."

Likewise, in *GROVEY V. TOWNSEND*, petitioners made the argument, as is made in the present case, that candidates for the offices of Senator and Representative in Congress were to be chosen at the primary election in which petitioner attempted to participate, and that in Texas nomination by the Democratic Party is equivalent to election. This court replied that such facts, even if true, did not make out a forbidden discrimination, since a similar situation might exist in other states where one or another party includes a greater majority of the qualified voters.

Petitioners, in the present case, charge that in *GROVEY V. TOWNSEND* the record had not been fully developed and hence this court could not be governed in the present case by its previous decision in which it disposed of the contentions presently made by petitioners. In reply to this argu-

ment, we need only point out that *GROVEY V. TOWNSEND* came to this court on demurrer in which all of the facts alleged in plaintiff's petition were assumed as true and the allegations made by plaintiff in such cause were certainly as favorable to them in every respect as the record which they have developed in this cause.

Petitioners have placed much emphasis on *UNITED STATES V. CLASSIC*, 311 U.S. 299, in support of their application. The facts in that case and this are not the same. *UNITED STATES V. CLASSIC* involved a criminal prosecution for election fraud, and in no wise did the court in that case deny the right of a political party to regulate its membership or that of its electors in the party primary elections. The court further pointed out in the *CLASSIC* case that the Louisiana primaries were conducted by the state at state expense, while the court, in *GROVEY V. TOWNSEND*, pointed out that the Texas Democratic primary is a party primary, the expense of which is borne by the party, the ballots for which are furnished by the agencies of the party, the votes are counted and returns made by instruments of the party, and the Democratic Convention is the organ of the party for the declaration of party principles and policies.

Under the Record in the present case it is clear that the conduct of the Democratic primaries in Harris County by respondents was as agents of the Democratic Party of Texas and not as officers of the State of Texas. It is further evident that the Democratic primaries were elections conducted by the Democratic party through its party officials for the selection of the party's nominees in the general election, and that such primaries were not elections conducted by the State of Texas. By reason of such facts it is apparent that petitioners have not been denied any rights guaranteed to them under the Constitution.

We conclude by borrowing from the language of JUSTICE McREYNOLDS in NIXON v. CONDON:

"Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The state may not interfere. Whites may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government."

It is respectfully urged that the judgment of the trial court and the circuit court should be affirmed.

Respectfully submitted,

WRIGHT MORROW,
Counsel for Amicus Curiae

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IN THE
Supreme Court of the United States

No. 51

OCTOBER TERM, 1943

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VS.

S. E. ALLWRIGHT, ELECTION JUDGE, AND
JAMES E. LIUZZA, ASSOCIATE ELECTION
JUDGE, FORTY-EIGHTH PRECINCT,
HARRIS COUNTY, TEXAS,
Respondents.

AMICI CURIAE ARGUMENT IN SUPPORT OF
RESPONDENTS' MOTION FOR REHEARING

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AMICI CURIAE ARGUMENT IN SUPPORT OF
RESPONDENTS' MOTION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES:

George A. Butler, as Chairman of the State Democratic Executive Committee, and the State Democratic Executive Committee, as *amici curiae*, present the following argument in support of the motion for rehearing filed in the above cause by Respondents.

Regardless of whether or not the Court, on motion for rehearing reaches a different conclusion from that expressed in the majority opinion, surely the Court will not leave standing in that opinion the following sentence:

“Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the State because of his color.”

The author of the opinion and the seven Justices that concurred do not look upon public officers as “rulers”; and certainly they will not write into the reports of the Supreme Court of the United States a sentence which to future generations may carry the implication that the Supreme Court of the United States regarded public officers as “rulers” over the people, instead of servants of the people.

II.

The right to organize and maintain a political party is secured by the Bill of Rights of the Constitution of the United States and by the Bill of Rights of the Constitution of Texas. Implied in this right is the further right of determining the policies of the party and its membership. (*Bell, et al., v. Hill, County Clerk*, 123 Tex. 531, 546; 74 S. W. (2d) 113, 120.) These rights are among those excepted from the general powers of government and reserved to the people. The right or power to determine the

qualifications for membership in a political party, like the power to determine the principles of the party, being incident to the right to organize such a party, is not a State function. If the Legislature could lawfully fix the qualifications for membership or declare the principles of such a party, it could even deny the right to organize a political party. Any attempt by the Legislature to treat any of these rights or powers as State functions and control them by legislative act would be an invasion of a right reserved to the people and withheld from the Legislature.

The resolution quoted in the majority opinion having been adopted in the exercise of the constitutional right peaceably to assemble and petition for the redress of grievances, and of rights incident to such right, and not under any statute pretending to empower political parties to determine the qualifications of its members, surely the author of the opinion and the Justices who concurred with him, will not leave standing in the opinion the thought that *United States vs. Classic* bears upon *Grove vs. Townsend*, "because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." Therein is the heart of the case, and the opinion begs the question by assuming that the power to fix the qualifications for party membership is "a State function" and that it has been delegated to political parties by legislative act.

—4—

III.

The State Democratic Convention in Houston, Texas, on May 24, 1932, resolved that: "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party, and as such entitled to participate in its deliberations." No amount of reasoning can avoid the conclusion that this case turns upon whether the act of adopting the resolution was State action or party action.

If the adoption of that resolution was not State action, then the provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States have no application, for those Amendments are directed against State and not party action. One is directed against any State denying a citizen the right to vote on account of race, color or previous condition of servitude; the other is directed against any State abridging the privileges or immunities of citizens, or depriving any person of life, liberty or property without due process of law, or denying any citizen within its jurisdiction the equal protection of the law.

Petitioner must prevail, if he prevails at all, by establishing that it was the action of the State of Texas, and not the action of the Democratic party, that denied him the right to vote in a Democratic primary.

In footnote and text, the majority opinion refers to most, if not all, of the several articles of the Texas statutes relating to party primaries. The conclusion

is drawn that these statutes make the party "which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election." While there is an obsolete statute which provides that the State Executive Committee may prescribe the qualifications of membership in a political party, the resolution was not adopted under that statute. The Texas law, as construed by the Supreme Court of Texas, leaves the right to fix the qualifications for membership in a political party where the Constitution placed it,—with the people who organize such a party. (*Bell, et al., vs. Hill County Clerk*, 123 Tex. 531, 546, 74 S. W. (2d) 113, 120.) "Whatever inherent power a State political party has to determine the content of its membership resides in the State convention." (*Nixon vs. Condon*, 286 U. S. 73, 84.) Texas law recognizes this principle. (*Bell, et al., vs. Hill, County Clerk*, 123 Tex. 531, 546, 74 S. W. (2d) 113, 120.) The determination of which Petitioner complains was not made under a statute. It was made by the party convention in the exercise of rights reserved to the people by the Constitution, and not in the exercise of a power of sovereignty committed to the government and delegated by the Legislature to political parties. The challenged action was a party action taken in the exercise of a right secured by the Constitution, and not a State action prohibited by the Constitution.

The Court has taken one view of the Texas primary statutes. Even in that view, as these statutes have been construed by the Supreme Court of Texas,

there is no statute purporting to treat as a State function the power to fix qualifications for party membership and to delegate that power to party conventions; and there is no statute which delegates to political parties any part of the powers invested in the departments of government. (*Bell, et al., vs. Hill, County Clerk*, 123 Tex. 531, 546, 74 S. W. (2d) 113, 120.)

There is another view that may be taken of these statutes. The other view is that the right to organize and maintain political parties inheres in the people; that this right is subject to the power of the Legislature to enact reasonable laws intended and designed to insure fair methods and fair expressions in party affairs and reasonably related to the preservation of the peace and good order of society; and that in so far as the Texas statutes provide how a party may set up the organization for holding primaries and conventions, they were intended and designed to prevent frauds and to insure fair methods and fair expressions in party actions.

Which of these two views should be taken of these statutes? Here history lends a light. Until a comparatively recent date (about 1900, *Our Times*, Sullivan, Scribner's, vol. 2, pp. 24, 65, 528), the method of selecting party nominees was by the convention system. Many people held the view that nominating conventions were controlled by a relatively few persons and, in instances, by obnoxious political machines; that they did not result in the expression of choices of the majority of the people, but led to a minority control of public affairs; and that in in-

stances they had been controlled by self-seeking influences, if not corrupt political bosses. The remedy for the actual or supposed evils of the convention system of nominating candidates was the direct primary. It was only natural that the laws which, in effect, abolished the convention system and adopted the direct primary would descend into considerable detail to avoid what were believed to be the evils of the convention system. The statutes, in so far as they relate to the details of party organization and party primaries, obviously were designed to prevent fraud and to secure fair expression in party action. It is equally obvious that they were not designed to commit to the political parties powers of government or make them agencies of the government. If this view is taken, the primary statutes are valid; if the view adopted by the Court in the majority opinion is accepted, many of these statutes must fall as impermissible restraints on the constitutional right to organize and maintain political parties.

If the Texas primary statutes are viewed for what they really are, namely, laws designed to prevent corruption and insure orderly process and fair expression in party action, then this case can be seen for what it really involves. It was not the State of Texas that adopted the resolution at the Houston convention on May 24, 1932. It was an assembly of delegates from the two hundred fifty-four counties of Texas who had been selected at county conventions by delegates who had been selected at precinct conventions. It met with an absolute liberty to determine who was entitled to sit in the convention; with

an absolute liberty to voice its views by resolution, or otherwise, on public questions. There was no law which limited the right of the convention to determine who should compose its membership or the membership of the political party that it represented. It acted by resolution declaring who were entitled to participate in the affairs of the Democratic primary, —a voluntary organization; it chose its company.

The Chief Executive of the State of Texas was without power to prorogue that convention. The Legislature of Texas was without power to say that it could not meet or that it must adjourn. The judiciary of the State of Texas had no lawful authority to settle the list of accredited delegates to the convention or to control the declaration of party principles. It was a meeting of free men, of a common political faith, in session for the purpose of selecting delegates to the National Democratic Convention to be held in the City of Chicago, and as such it represented the Democratic party as it existed in Texas. To deny the convention the right to say who might participate in the party actions, would be as objectionable as to deny it the right to meet.

It is no argument to say that one of the Texas statutes provides that a party convention may not place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary, for that statute is so obviously in conflict with the constitutional right of petition that citation of authority is not necessary to establish its invalidity.

To denominate the convention a State agency would presuppose that it had been appointed by governmental authority to represent and exercise a portion of sovereign power. There is no statute which invested the convention with any fraction of the sovereign power of the State.

True it is that with a relatively few exceptions, but yet with some, the nominees of the Democratic primary have prevailed in elections in Texas; but the fact that the Democratic party represents the views of a majority of the people of Texas does not afford any reason why its rights and the rights of minority parties should not be measured by the same standards. People of any shade of political thought may organize political parties and function as such under the Texas primary statutes. The Legislature has no power to say, and it has not attempted to say, either directly or indirectly, who may and who may not be admitted to membership in existing political parties or in parties to be formed in the future. That is not a State power or a State function. Is the Republican Party an agency of the State to determine who may participate in the affairs of that party, or does it act in that respect as a party of people of a common political faith? It would hardly be contended by any that the Republican Party acts as an agency of the State in determining who may participate in Republican Party affairs. The fact that the Democratic Party in Texas has generally been successful in electing its nominees is not a logical basis for a conclusion that the Legislature has made that

party an agency of the State to determine who may participate in affairs of the Democratic Party.

Respectfully submitted,

WRIGHT MORROW,

DAN MOODY,

Attorneys for George A. Butler,
Chairman, State Democratic Ex-
ecutive Committee, and State
Democratic Executive Commit-
tee, *amici curiae*.

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NO. 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

LONNIE E. SMITH,

Petitioner

v.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,
Respondents

**MOTION FOR REHEARING OF GROVER
SELLERS, ATTORNEY GENERAL OF TEX-
AS, AS AMICUS CURIAE**

GROVER SELLERS

Attorney General of Texas

GEORGE W. BARCUS

Assistant Attorney General

R. DEAN MOORHEAD

Assistant Attorney General

Attorneys for Amicus Curiae

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**MOTION FOR REHEARING OF GROVER
SELLERS, ATTORNEY GENERAL OF TEX-
AS, AS AMICUS CURIAE**

To the Honorable Supreme Court:

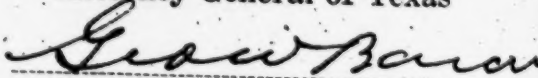
Now comes Grover Sellers, the Attorney General of the State of Texas, successor to Gerald C. Mann, as amicus curiae, and submits herewith his motion for the Court to set aside its opinion and judgment rendered herein on the 3rd day of April, 1944, and, upon further consideration, to affirm the judgments of the Courts below.

Because of the gravity of this Court's action in overruling its decision in *Grovey v. Townsend*, 295 U. S. 45, and because of the great importance of this question to the people of Texas and of the South, the Attorney General of Texas further prays that the Court set this cause for additional oral argument.

Respectfully submitted,

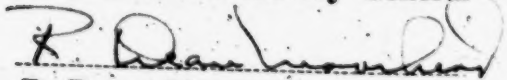
GROVER SELLERS

Attorney General of Texas



GEORGE W. BARCUS

Assistant Attorney General



R. DEAN MOORHEAD

Assistant Attorney General

Attorneys for Amicus Curiae

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**MOTION FOR REHEARING OF GROVER
SELLERS, ATTORNEY GENERAL OF TEX-
AS, AS AMICUS CURIAE**

To the Honorable Supreme Court:

Now comes Grover Sellers, Attorney General of the State of Texas, successor to Gerald C. Mann, as amicus curiae, and moves that this Court set aside its judgment in this cause, rendered on the 3rd day of April, 1944, and that upon further consideration the Court affirm the judgments of the Courts below in said cause. In support of this motion, the At-

torney General of Texas says that this Court erred in holding that the Fifteenth Amendment to the Constitution of the United States is violated when persons other than white persons are denied the privilege of voting in primary elections of the Democratic Party of Texas. In this respect, the Attorney General of Texas states:

I

In its opinion in this cause, this Court said:

“Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the State because of his color.”

Despite the seeming unpopularity of its philosophy among certain strata of our government, the State of Texas continues to adhere to the fundamental American principle that elections are conducted, not for the purpose of choosing “rulers,” but for the purpose of selecting “public servants.” An understanding of this philosophy is perhaps basic to an understanding of the position taken by the Attorney General in this cause. Basic also is an understanding and full appreciation of the Bill of Rights with its guarantees of political thought and expression and its injunction that the powers not delegated to the United States nor prohibited to the States are reserved to the States and to their people. Fundamental to the position of the Attorney General is the principle that this should remain a government of laws rather than of men, and that the laws govern-

ing freedom of political thought and action should not be extended to those organizations with whose practices our "rulers" agree and denied to those with whose practices they disagree.

It is undisputed that the Democratic Party of Texas is a voluntary association, composed of persons with similar political tenets, and organized for the sole purpose of making these tenets effective in a peaceable fashion through the operation of the electoral processes. It is undisputed that under the laws of the State of Texas, the Democratic Party may prescribe the qualifications of its members, and that such prescription is not a legislative boon conferred by Article 3107, Vernon's Annotated Civil Statutes of Texas, but that it is an inherent privilege of a voluntary association, and, as such, is beyond control or interference by any governmental agency, *Bell v. Hill*, 123 Tex. 531, 74 S.W. (2d) 113. If the members so selected are to make effective their political beliefs, it seems obvious that they can do so only by selecting candidates who are truly representative of the Party membership and who fully subscribe to the thoughts and beliefs of the Party. In a democratic society, such selection can only be by a full and fair vote in a primary election. It would, of course, be possible for the Party to emulate those other voluntary associations to whom our government is now according the fullest protection, and to achieve its goals by violence, by political blackmail, or by an autocratic selection of its representatives. However, in lieu of these methods, the Democratic Party of Texas has chosen to place its views before

the people by means of candidates who are fairly and honestly elected by the Party membership. In appearing in this case, the Attorney General of Texas is arguing only that the Democratic Party possesses a constitutional right to pursue this course. If an association of Negroes, or of any race, creed or color, should choose to pursue a similar course, and if its privilege to do so should be in jeopardy, the Attorney General would be equally vigorous in its defense.

In its opinion, this Court makes much of the fact that the statutes of Texas regulate the manner in which primary elections are conducted. It is true that the statutes so operate, but it is equally true that under the Constitution and decisions in Texas, all primary elections are conducted by party officials at party expense, and that the State can say not one word with respect to the persons who are entitled to participate in such elections. In the case of *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, the Supreme Court of Texas long ago held that the suffrage provisions of the Texas Constitution and statutes are applicable only to "governmental elections" and that primary elections can in no way be considered "governmental elections." Insofar as the suffrage provisions of the Texas statutes purport to extend to primary elections, they are, under this decision, null and void. The Fifteenth Amendment to the Federal Constitution stands as a guarantee against the denial or abridgment of the right to vote only when such denial or abridgement is the result of State

action; it is no way guarantees the right to vote in "non-governmental elections" when the denial of such right is the result of action on the part of a private association.

The statutes by which the State of Texas regulates the manner of conducting primary elections are but those which would be passed by any enlightened state to insure the purity of the ballot. Insofar as they are effective, they relate exclusively to the *method* of voting and not to the *qualifications of voters*. Plainly these statutes are primarily designed not for the protection of the Democratic Party, but for the protection of the entire State, so that the whole of the citizenry shall not suffer from corruption on the part of a few. If it be the thought of this Court that the presence of such statutes constitutes the Democratic Party a state agency and thus brings it within the scope of the Fifteenth Amendment, the defects in such belief are apparent. Texas and other states impose a host of regulations upon the method of conducting other "non-governmental elections" such as those of banks, of insurance companies, and of other private associations. Again, the purpose of these regulations is to protect the whole of the State from improper action on the part of a few, yet it could scarcely be contended that the existence of such regulations metamorphoses these organizations into state agencies and places their elections within the Fifteenth Amendment. Strange indeed is a doctrine which transforms a private association into a state agency merely because the police powers of the

State are applicable to such association.

From the opinion of the Court one gleans occasional hints that perhaps the factor which brings primary elections within the scope of the Fifteenth Amendment is not the presence of statutes regulating these elections, but rather that it is the fact that the names of the Party nominees are placed on the official ballot in the general election. Apparently it is thought that since this is so, the denial of the right to vote in a primary election is in some way a denial of the right to a free expression of opinion in the general election, and hence that the franchise is in effect denied by the action of the State. A mere statement of this chain of reasoning should suffice to demonstrate its infirmities, and to raise doubts as to whether it is the result of that syllogistic reasoning which begins with a premise and terminates with a conclusion, or whether the reverse is true. Under the laws of Texas, the denial of a vote in a Democratic primary withholds from no man the privilege of making an unfettered choice of candidates in the general election. The statutes of Texas make full provision for placing on the ballot in the general election the names of independent candidates, of non-partisan candidates, of candidates whose parties do not conduct a primary election, and of candidates whose parties do not maintain a state organization. In addition, the official ballot must contain a blank space to permit the voter to cast his ballot for any person whose name is not printed thereon. See Chapter 13 of Title 50 of the Revised Civil Statutes of Texas, and Article 2978. Thus,

those who for any reason are unable to vote in a Democratic primary are free to enter the names of their candidates in the general election and to cast their ballots in favor of such candidates. Moreover, this unfettered choice extends even to those who have voted in a primary election, since it is settled that the pledge of party loyalty contained on the ballots in primary elections is in no way legally enforceable. *Love v. Wilcox*, 119 Tex. 256. Regardless of how the candidates of the Democratic Party are selected, such selection denies to no man the privilege of placing the name of the candidate of his choice upon the ballot in the general election and of voting for such candidate.

Other portions of the opinion of this Court seem to say that while the Party is free to choose its membership, and thus may limit such membership to white persons, the Party is not likewise free to limit the persons who may participate in its elections. In essence, this is to say that a political party cannot confine its own elections to its own members, but that it must permit non-members to vote in such elections. Such a holding makes a mockery of the primary election system. If primaries serve any purpose, they serve the purpose of selecting candidates whose views and beliefs are in accord with those of the organization whom they represent. Yet under the decision of this Court, the admission of outsiders to a Party election might well result in the selection of a so-called "Democratic candidate" who would in no way be representative of the Party membership. Other states employ "branding iron

primaries" and registration statutes for the dual purposes of insuring that non-members will not interfere with the results of Party elections and of guaranteeing the selection of representative candidates. The validity of such practices is firmly established, yet this Court is in the position of denying the Democratic Party of Texas the privilege of accomplishing the same ends by another means.

Political parties exist only for the purposes of formulating those policies which they deem most beneficial to the state or nation and of securing the adoption of these policies by a majority of the people. In most instances, this adoption can be secured only by the election to public office of the candidates of such parties. In upholding the right of a party to limit its membership while denying it the right to select candidates who are chosen solely by such membership, this Court pays lip service to the inherent rights of existence of political parties while denying such parties the one practical means of making this existence purposeful. If freedom of political thought and expression is guaranteed by the Constitution, it would seem to follow that the means of making such thought effective in a democratic society are equally guaranteed.

II

It seems futile to argue further the applicability of this Court's prior decisions to the instant situation. That the case of *United States v. Classic*, 313 U. S. 299, is in no way relevant has been demon-

strated both in the briefs and argument of counsel and in Mr. Justice Roberts' apt and eloquent dissent. The other prior decisions of this Court, embodying as they do a logic consistent with the philosophy of those who founded the Court and who have occupied its benches for the preceding century and a half, have met the fate of being overruled rather than of being either applied or distinguished.

Certainty has heretofore been deemed the touchstone of the law, and that certainty has been obtained by a conscientious judicial application of the doctrine of *stare decisis* in order that once the law on a given subject has been enunciated, law-abiding men might thereby govern their conduct and rest assured that their actions are proper. While the doctrine of *stare decisis* has never demanded a blind adherence to past decisions, it has at least commanded a respect for the views of those who rendered such decisions and has influenced a general judicial recognition that such decisions should stand unchanged unless they are flagrantly erroneous or unless altered conditions have made them inapplicable to current situations. Nine years ago in the case of *Grovey v. Townsend*, 295 U. S. 45, this Court decided the question here involved in a manner directly contrary to its present decision. One can scarcely think that conditions are now so altered as to demand a reversal of the prior decision. Moreover, since nine justices in that case unanimously reached a conclusion contrary to that reached by eight justices in the instant case, one cannot say that the prior decision was flagrantly erroneous. At most, one can merely

say that the question of the correctness of the decision is one upon which reasonable men might well differ, and have differed. The decision of this Court has made criminals of thousands of Texas election officials who have in fact done nothing except to follow this Court's opinion in *Grovey v. Townsend*. By assuming that the law possesses a modicum of certainty and by following the law as it was enunciated by this Court in 1935, these officials now learn that they are liable for damages and that they have violated those penal statutes which guarantee a ballot to all qualified persons. Under the decision of this Court, the present situation of these officials is lamentable, but perhaps even more distressing is their future. What importance shall the election officials of Texas attach to the instant decision? Is it, as Mr. Justice Roberts predicts, comparable to a restricted railroad ticket, good for this day and train only? If election officials act upon the basis of the instant decision, will succeeding decisions of this same term of Court, or of future terms, once more transform them into malefactors? The Greek philosopher Heracleitus is credited with saying that all is change, all is flux. The people of the State of Texas are interested in seeing if this doctrine is now to be elevated over the doctrine of *stare decisis*.

III

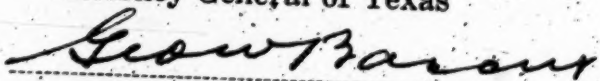
WHEREFORE, premises considered, the Attorney General of Texas, as *amicus curiae*, prays that this motion be granted, that the judgment of this Court

heretofore rendered on the 3rd day of April, 1944,
be set aside, and that upon further consideration the
judgments of the lower Courts be in all things af-
firmed.

Respectfully submitted,

GROVER SELLERS

Attorney General of Texas



GEORGE W. BARCUS

Assistant Attorney General



R. DEAN MOORHEAD

Assistant Attorney General

Attorneys for Amicus Curiae

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Supreme Court of the United States

October Term, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

vs.

**S. E. ALLWRIGHT, Election Judge, and JAMES E.
LIUZZA, Associate Election Judge, 48th Precinct of
Harris County, Texas,**

Respondents.

PETITION FOR REHEARING

LEWIS FISHER,

GLENN A. PERRY,

Houston, Texas,

Attorneys for Respondents.

Supreme Court of the United States

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No. 51

LONNIE E. SMITH,

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S. E. ALLWRIGHT, Election Judge, and JAMES E. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondents.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES SUPREME COURT:

Now come the Respondents, S. E. Allwright and James J. Liuzza, within 25 days after the filing of the opinion in the above entitled cause on April 3, 1944, and petition the Court to grant Respondents a rehearing thereof on the grounds that the Court erred in overruling *Grovey vs. Townsend* 245 U. S. 45 (1935) in its opinion in the present case.

The opinion in *Grovey vs. Townsend* was rendered by a unanimous Court and the Statutes of Texas, as passed on in that case, have not been changed in any great respect since.

The Statutes of Louisiana as construed in *United States vs. Classic* 313 U. S. 291 (1941) clearly make the primary elections as conducted in the State of Louisiana an integral part of the election machinery of that State. The Statutes of Louisiana provide that the State shall at its own expense conduct the elections (R. 83). The Statutes of Texas do not make any such provision but to the contrary clearly provide that the expense of the elections shall be borne by the candidates (members of th party) (R. 83-84 quoting *Grovey vs. Townsend*).

The instructions for the holding of primaries are received from the County Democratic Executive Committee (R. 107-120). The Presiding Judges who conduct the primaries are appointed by the County Democratic Executive Committee (R. 107) and there is no contradiction that the returns are made by the County Executive Committee and certified by the County Convention and State Convention.

The enacting of Statutes is purely a legislative action and in the hands of the State Legislature. No one claims the State Legislature is an instrumentality of the Democratic Party of Texas. The Democratic Party (nor any other party) in Texas is not responsible for the acts of the Legislature and cannot prevent enactment of statutes which attempt to control party affairs.

The Democratic Party of Texas is a political party composed of a voluntary association of persons who have common political ideas and assembled in convention in

1932 adopted a resolution restricting its membership (R. 75). The policies of the party are made at the conventions (R. 125), and are not made by the Legislature:

In fact it has been the idea and practice of the Democratic Party of Texas to pass resolutions and policies, governing the party at its conventions where the representatives of the party are assembled.

If In construing the opinion of the Court in the present case, it is to be presumed that the passing of a statute destroys the rights guaranteed to individuals by the Bill of Rights of the United States and Texas, then Churches, Lodges and other voluntary groups of like minded individuals will continually be burdened with the necessity of keeping in constant touch with the Legislature in an attempt to prevent legislation which might affect their right to control their own affairs. I am sure that the Court did not intend to render an opinion that would destroy the Bill of Rights.

The Statutes of Texas nor the Democratic Party of Texas have never prevented the Petitioner or members of his race from organizing a party of their own and conducting primaries as they see fit.

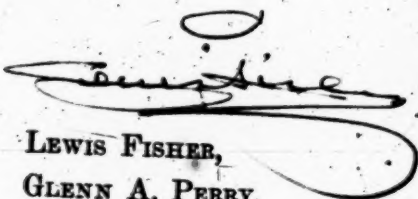
Conclusion:

A comparison of the present case with *Grovey vs. Townsend and Bell vs. Hill* (74 S. W. 2113) will show that every proposition advanced by the Petitioner in the

case at bar was advanced and considered in *Grovey vs. Townsend* and *Bell vs. Hill*. The case at bar cannot be compared with the case of *United States vs. Classic* for the reasons as outlined in the dissenting opinion of Justice Roberts.

We, therefore, respectfully urge that, a rehearing be granted the Respondents in this case.

Respectfully submitted,




LEWIS FISHER,
GLENN A. PERRY,
Attorneys for Respondents.

LEWIS FISHER,
Houston, Texas.

GLENN A. PERRY,
Houston, Texas.

I hereby certify that the petition herein is presented
in good faith and not for delay.



LEWIS FISHER

SUPREME COURT OF THE UNITED STATES.

No. 51.—OCTOBER TERM, 1943.

Lonnie E. Smith, Petitioner,
vs.

S. E. Allwright, Election Judge,
and James E. Liuzza, Associate
Election Judge, 48th Precinct of
Harris County, Texas.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Fifth Circuit.

[April 3, 1944.]

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of \$5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate Sections 31 and 43 of Title 8¹ of the United States Code in that petitioner was deprived of rights secured by Sections 2 and 4 of Article I² and

18 U. S. C. § 31:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

§ 43: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

² Constitution, Art. I:

"Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors

the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution.³ The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code Section 24, subsection 14.⁴

The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*, 295 U. S. 45.⁵ We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States v. Classic*, 313 U. S. 299. 319 U. S. 738:

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be deemed a qualified elector." Constitution of Texas, Article VI, Section 2; Vernon's Civil Statutes (1939 ed.), Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic Party was required to hold the primary which was the

in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

"Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

³ Constitution:

Article XIV. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article XV. "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Article XVII. "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

⁴ A declaratory judgment also was sought as to the constitutionality of the denial of the ballot. The judgment entered declared the denial was constitutional. This phase of the case is not considered further as the decision on the merits determines the legality of the action of the respondents.

⁵ *Smith v. Allwright*, 131 F. 2d 593.

occasion of the alleged wrong to petitioner. A summary of the state statutes regulating primaries appears in the footnote.⁶ These nominations are to be made by the qualified voters of the party. Art. 3101.

⁶ The extent to which the state controls the primary election machinery appears from the Texas statutes, as follows: Art. 3118, Vernon's Texas Statutes, provides for the election of a county chairman for each party holding a primary by the "qualified voters of the whole county," and of one member of the party's county executive committee by the "qualified voters of their respective election precincts." These officers have direct charge of the primary. There is in addition statutory provision for a party convention: the voters in each precinct choose delegates to a county convention, and the latter chooses delegates to a state convention. Art. 3134. The state convention has authority to choose the state executive committee and its chairman. Art. 3139, 1939 Supp. Candidates for offices to be filled by election are required to be nominated at a primary election if the nominating party cast over 100,000 votes at the preceding general election. Art. 3101. The date of the primary is fixed at the fourth Saturday in July; a majority is required for nomination, and if no candidate receives a majority, a run-off primary between the two highest standing candidates is held on the fourth Saturday in August. Art. 3102. Polling places may not be within a hundred yards of those used by the opposite party. Art. 3103. Each precinct primary is to be conducted by a presiding judge and the assistants he names. These officials are selected by the county executive committee. Art. 3104. Absentee voting machinery provided by the state for general elections is also used in primaries. Art. 2956. The presiding judges are given legal authority similar to that of judges at general elections. Compare Art. 3105 with Art. 3002. The county executive committee may decide whether county officers are to be nominated by majority or plurality vote. Art. 3106. The state executive committee is given power to fix qualifications of party membership, Art. 3107; Art. 2955, 1942 Supp., requires payment of a poll tax by voters in primary elections, and Art. 3093(3) deals with political qualifications of candidates for nomination for United States Senator. But cf. *Bell v. Hill*, 123 Tex. 531. Art. 3108 empowers the county committee to prepare a budget covering the cost of the primary and to require each candidate to pay a fair share. The form of the ballot is prescribed by Art. 3109. Art. 3101 provides that the nominations be made by the qualified voters of the party. Cf. Art. 3091. Art. 3110 prescribes a test for voters who take part in the primary. It reads as follows:

"No official ballot for primary election shall have on it any symbol or device, or any printed matter, except a uniform primary test, reading as follows: 'I am a . . . (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary;' and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted." This appears, however, to be a morally rather than a legally enforceable pledge. See *Love v. Wilcox*, 119 Tex. 256.

Arts. 3092 and 3111 to 3114 deal with the mechanics of procuring a place on the primary ballot for federal, state, district, or county office. The request for a place on the ballot may be made to the state, district or county party chairman, either by the person desiring nomination or by twenty-five qualified voters. The ballot is prepared by a subcommittee of the county executive committee. Art. 3115. A candidate must pay his share of the expenses of the election before his name is placed on the ballot. Art. 3116. Art. 3116, however, limits the sum that may be charged candidates for certain posts, such as the offices of district judge, judge of the Court of Civil Appeals,

The Democratic Party of Texas is held by the Supreme Court of that state to be a "voluntary association," *Bell v. Hill*, 123 Tex. 531, 534, protected by Section 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the state except that:

and senator and representative in the state and federal legislatures, and for some counties fees are fixed by Arts. 3116 a-d, 1939 Supp., and 3116 e-f, 1942 Supp. Supplies for the election are distributed by the county committee, Art. 3119, and Art. 3120 authorizes the use of voting booths, ballot boxes and guard rails, prepared for the general election, "for the organized political party nominating by primary election that cast over one hundred thousand votes at the preceding general election." The county tax collector must supply lists of qualified voters by precincts; and these lists must be used at the primary. Art. 3121. The same precautions as to secrecy and the care of the ballots must be observed in primary as in general elections. Art. 3122. Arts. 3123-25 cover the making of returns to the county and state chairmen and canvass of the result by the county committee. By Art. 3127, a statewide canvass is required of the state executive committee for state and district officers and a similar canvass by the state convention, with respect to state officers, is provided by Art. 3138. The nominations for district offices are certified to the county clerks, and for state officers to the Secretary of State. Arts. 3127, 3137, 3138. Ballot boxes and ballots are to be returned to the county clerk, Art. 3128, 1942 Supp., and upon certification by the county committee, the county clerk must publish the result. Art. 3129, 1942 Supp. If no objection is made within five days, the name of the nominee is then to be placed on the official ballot by the county clerk. Art. 3131, 1942 Supp. Cf. Arts. 2978, 2984, 2992, 2996. Arts. 3146-53, 1942 Supp., provide for election contests. The state district courts have exclusive original jurisdiction, and the Court of Civil Appeals has appellate jurisdiction. The state courts are also authorized to issue writs of mandamus to require executive committees, committeemen, and primary officers to discharge the duties imposed by the statute. Art. 3142; cf. Art. 3124.

The official ballot is required to contain parallel columns for the nominees of the respective parties, a column for independent candidates, and a blank column for such names as the voters care to write in. Arts. 2978, 2980. The names of nominees of a party casting more than 100,000 votes at the last preceding general election may not be printed on the ballot unless they were chosen at a primary election. Art. 2978. Candidates who are not party nominees may have their names printed on the ballot by complying with Arts. 3159-62. These sections require applications to be filed with the Secretary of State, county judge, or mayor, for state and district, county, and city offices, respectively. The applications must be signed by qualified voters to the number of from one to five per cent of the ballots cast at the preceding election, depending on the office. Each signer must take an oath to the effect that he did not participate in a primary at which a candidate for the office in question was nominated. While this requirement has been held to preclude one who has voted in the party primary from appearing on the ballot as an independent, *Westerman v. Mims*, 111 Tex. 29, 227 S. W. 178; see *Cunningham v. McDermott*, 277 S. W. 218 (Civ. App.), one who lost at the primary may still be elected at the general election by a write-in vote. *Cunningham v. McDermott*, *supra*.

The operations of the party are restricted by the state in one other important respect. By Art. 3139, 1939 Supp., the state convention can announce a platform of principles, but its submission at the primary is a prerequisite to party advocacy of specific legislation. Art. 3132.

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the state may regulate such elections by proper laws." P. 545.

That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this State, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed,—including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights,—that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances, be conferred upon a State or governmental agency." P. 546. Cf. *Waples v. Marrast*, 108 Texas 5.

The Democratic party on May 24, 1932, in a State Convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations."

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government.⁷ The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary or-

⁷ Cf. *Parker v. Brown*, 317 U. S. 341, 359-60.

ganization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party not governmental officers. No appearance for respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as amici curiae, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon v. Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107. (Rev. Stat. 1925) declared "in no event shall a Negro be eligible to participate in a Democratic Party primary election in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought a suit for damages against the election officers under R. S. § 1979 and 2004, the present sections 43 and 31 of Title 8, U. S. C., respectively. It was urged to this Court that the denial of the franchise to Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The legislature of Texas reenacted the article but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary and again brought suit for damages by virtue of Section 31, Title 8 U. S. C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be State action and invalid as discriminatory under the Four-

teenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon v. Condon*, 286 U. S. 73. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 84-85.

In *Grovey v. Townsend*, 295 U. S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon v. Condon*, *supra*, in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the state. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the state need have no concern," *loc. cit.* at 55, while for a state to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendments.

Since *Grovey v. Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States v. Classic*, 313 U. S. 299. We there held that Section 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, 313 U. S. at 316, 317, "where the primary is by law made an integral part of the election machinery." 313 U. S. at 318. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code. Thereby corrupt acts of election officers

were subjected to Congressional sanctions because that body had power to protect rights of Federal suffrage secured by the Constitution in primary as in general elections. 313 U. S. at 323. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of Federal officials. By this decision, the doubt as to whether or not such primaries were a part of "elections" subject to Federal control, which had remained unanswered since *Newberry v. United States*, 256 U. S. 232, was erased. The *Nixon Cases* were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state. When *Grovey v. Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U. S. at 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of

the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey v. Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. Other precedents of this Court forbid the abridgement of the right to vote. *United States v. Reese*, 92 U. S. 214, 217; *Neal v. Delaware*, 103 U. S. 370, 388; *Guinn v. United States*, 238 U. S. 347, 361; *Myers v. Anderson*, 238 U. S. 368, 379; *Lane v. Wilson*, 307 U. S. 268.

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U. S. at 314; *Myers v. Anderson*, 238 U. S. 368; *Ex parte Yarborough*, 110 U. S. 651, 663 *et seq.* By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell v. Hill*, *supra*, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land." *Nixon v. Condon*, 286 U. S. 73, 88; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483; *Bridges v. California*, 314 U. S. 252; *Lisenba v. California*, 314 U. S. 219, 238; *Union Pacific R. Co. v. United States*, 313 U. S. 450, 467; *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 294; *Chambers v. Florida*, 309 U. S. 227, 228. Texas requires electors in a primary to pay a

poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955. As appears above in the summary of the statutory provisions set out in note 6, Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows substan-

tially that of Louisiana, with the exception that in Louisiana the state pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the state or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn v. United States*, 238 U. S. 347, 362.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson*, 307 U. S. 268, 275.

The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend*, 295 U. S. 45, 55, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions.⁸ However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised

⁸ Cf. *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 652.

its power to reexamine the basis of its constitutional decisions. This has long been accepted practice,⁹ and this practice has continued to this day.¹⁰ This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.¹¹ Here we are applying, contrary to the recent decision in *Grovey v. Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled.

Judgment reversed.

Mr. Justice FRANKFURTER concurs in the result.

⁹ See cases collected in the dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 410.

¹⁰ See e.g., *United States v. Darby*, 312 U. S. 100, overruling *Hammer v. Dagenhart*, 247 U. S. 251; *Colifornia v. Thompson*, 313 U. S. 109, overruling *DiSanto v. Pennsylvania*, 273 U. S. 34; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, overruling *Adkins v. Children's Hospital*, 261 U. S. 525; *Helvering v. Producers Corp.*, 303 U. S. 376, overruling *Gillespie v. Oklahoma*, 257 U. S. 501, and *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393; *Erie R. Co. v. Tompkins*, 304 U. S. 64, overruling *Swift v. Tyson*, 16 Pet. 1; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, overruling *Collector v. Day*, 11 Wall. 113, and *New York ex rel. Rogers v. Graves*, 299 U. S. 401; *O'Malley v. Woodrough*, 307 U. S. 277, overruling *Miles v. Graham*, 268 U. S. 501; *Madden v. Kentucky*, 309 U. S. 83, overruling *Colgate v. Harvey*, 296 U. S. 404; *Helvering v. Hallock*, 309 U. S. 106, overruling *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 48; *Nye v. United States*, 313 U. S. 33, overruling *Toledo Newspaper Co. v. United States*, 247 U. S. 402; *Alabama v. King & Boozer*, 314 U. S. 1, overruling *Panhandle Oil Co. v. Knox*, 277 U. S. 218 and *Graves v. Texas Co.*, 298 U. S. 393; *Williams v. North Carolina*, 317 U. S. 287, overruling *Haddock v. Haddock*, 201 U. S. 562; *State Tax Commission v. Aldrich*, 316 U. S. 174, overruling *First National Bank v. Maine*, 284 U. S. 312; *Board of Education v. Barnette*, 319 U. S. 624, overruling *Minersville School District v. Gobitis*, 310 U. S. 586.

¹¹ Cf. Dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 at 410.

SUPREME COURT OF THE UNITED STATES.

No. 51.—OCTOBER TERM, 1943.

Lonnie E. Smith, Petitioner, vs. S. E. Allwright, Election Judge, et al.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
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[April 3, 1944.]

Mr. Justice ROBERTS.

In *Mahnich v. The Southern Steamship Co.*, No. 200 of the present term, I have expressed my views with respect to the present policy of the court freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency, it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. I shall not repeat what I there said for I consider it fully applicable to the instant decision, which but points the moral anew.

A word should be said with respect to the judicial history forming the background of *Grovey v. Townsend*, 295 U. S. 45, which is now overruled.

In 1923 Texas adopted a statute which declared that no negro should be eligible to participate in a Democratic primary election in that State. A negro, a citizen of the United States and of Texas, qualified to vote, except for the provisions of the statute, was denied the opportunity to vote in a primary election at which candidates were to be chosen for the offices of senator and representative in the Congress of the United States. He brought action against the judges of election in a United States court for damages for their refusal to accept his ballot. This court unanimously reversed a judgment dismissing the complaint and held that the judges acted pursuant to State law and that the State of Texas, by its statute, had denied the voter the equal protection secured by the Fourteenth Amendment. *Nixon v. Herndon*, 273 U. S. 536 (1927).

In 1927 the legislature of Texas repealed the provision condemned by this court and enacted that every political party in the State might, through its Executive Committee prescribe the qualifications of its own members and determine in its own way who should be qualified to vote or participate in the party, except that no denial of participation could be decreed by reason of former political or other affiliation. Thereupon the State Executive Committee of the Democratic Party in Texas adopted a resolution that white Democrats, and no other, should be allowed to participate in the party's primaries.

A negro, whose primary ballot was rejected pursuant to the resolution, sought to recover damages from the judges who had rejected it. The United States District Court dismissed his action, and the Circuit Court of Appeals affirmed; but this court reversed the judgment and sustained the right of action by a vote of 5 to 4. *Nixon v. Condon*, 286 U. S. 73 (1932).

The opinion was written with care. The court refused to decide whether a political party in Texas had inherent power to determine its membership. The court said, however: "Whatever inherent power a State political party has to determine the content of its membership resides in the State convention", and referred to the statutes of Texas to demonstrate that the State had left the Convention free to formulate the party faith. Attention was directed to the fact that the statute under attack did not leave to the party convention the definition of party membership but placed it in the party's State Executive Committee which could not, by any stretch of reasoning, be held to constitute the party. The court held, therefore, that the State Executive Committee acted solely by virtue of the statutory mandate and as delegate of State power, and again struck down the discrimination against negro voters as deriving force and virtue from State action,—that is, from statute.

In 1932 the Democratic Convention of Texas adopted a resolution that "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."

A negro voter qualified to vote in a primary election, except for the exclusion worked by the resolution, demanded an absentee ballot which he was entitled to mail to the judges at a primary

election except for the resolution. The county clerk refused to furnish him a ballot. He brought an action for damages against the clerk in a state court. That court, which was the tribunal having final jurisdiction under the laws of Texas, dismissed his complaint and he brought the case to this court for review. After the fullest consideration by the whole court¹ an opinion was written representing its unanimous views and affirming the judgment. *Grovey v. Townsend*, 295 U. S. 45 (1935).

I believe it will not be gainsaid the case received the attention and consideration which the questions involved demanded and the opinion represented the views of all the justices. It appears that those views do not now commend themselves to the court. I shall not restate them. They are exposed in the opinion and must stand or fall on their merits. Their soundness, however, is not a matter which presently concerns me.

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term the court has overruled three cases.

In the present case, as in *Mahnich v. Southern S.S. Co.*, No. 200, the court below relied, as it was bound to, upon our previous decision. As that court points out, the statutes of Texas have not been altered since *Grovey v. Townsend* was decided. The same resolution is involved as was drawn in question in *Grovey v. Townsend*. Not a fact differentiates that case from this except the names of the parties.

It is suggested that *Grovey v. Townsend* was overruled *sub silentio* in *United States v. Classic*, 313 U. S. 299. If so, the situation is even worse than that exhibited by the outright repudiation of an earlier decision, for it is the fact that, in the *Classic* case, *Grovey v. Townsend* was distinguished in brief and argument by the Government without suggestion that it was wrongly decided, and was relied on by the appellees, not as a controlling decision, but by way of analogy. The case is not

¹ The court was composed of Hughes, C. J., VanDevanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo, JJ.

mentioned in either of the opinions in the *Classic* case. Again and again it is said in the opinion of the court in that case that the voter who was denied the right to vote was a fully qualified voter. In other words, there was no question of his being a person entitled under state law to vote in the primary. The offense charged was the fraudulent denial of his conceded right by an election officer because of his race. Here the question is altogether different. It is whether, in a Democratic primary, he who tendered his vote was a member of the Democratic Party.

I do not stop to call attention to the material differences between the primary election laws of Louisiana under consideration in the *Classic* case and those of Texas which are here drawn in question. These differences were spelled out in detail in the Government's brief in the *Classic* case and emphasized in its oral argument. It is enough to say that the Louisiana statutes required the primary to be conducted by State officials and made it a State election, whereas, under the Texas statute, the primary is a party election conducted at the expense of members of the party and by officials chosen by the party. If this court's opinion in the *Classic* case discloses its method of overruling earlier decisions, I can only protest that, in fairness, it should rather have adopted the open and frank way of saying what it was doing than, after the event, characterize its past action as overruling *Grovey v. Townsend* though those less sapient never realized the fact.

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.